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No. 98-1778

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

MARY KOVELESKIE,
Petitioner,

v.

SBC CAPITAL MARKETS, INC.,
a/k/a SBC WARBURG, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a mandatory arbitration agreement, which is entered into as a condition of employment, requiring an employee to pay expensive filing fees to initiate prosecution of Title VII claims and potentially to be liable for an uncapped amount of daily-accruing forum fees is enforceable under the Federal Arbitration Act or Title VII?

2. Whether a mandatory arbitration agreement, which is entered into as a condition of employment, requiring an employee to arbitrate in a forum that instructs its arbitrators that they are "not strictly bound by case precedent or statutory law," is enforceable under the Federal Arbitration Act or Title VII?

3. Whether an arbitration system that requires an employee to pay expensive filing fees and uncapped forum fees and instructs arbitrators that they are "not strictly bound by case precedent or statutory law" is inconsistent with the Civil Rights Act of 1991?

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All parties appear in the caption of this petition on the cover page.

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Petitioner respectfully submits that a writ of *certiorari* should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 167 F.3d 361 and is reprinted in Appendix A hereto at 1a-18a. The District Court's opinion of March 18, 1998, denying respondent's motion to compel arbitration, is not reported and is reprinted in Appendix B at 19a-20a.

JURISDICTION

The Order of the Court of Appeals reversing the District Court's opinion of March 18, 1998 was dated and entered on February 4, 1999. This petition is timely filed within 90 days of the Order of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1). Petitioner first invoked federal court jurisdiction in the case under 28 U.S.C. §§ 1331, 1343, and 1367.

STATUTES INVOLVED

The following statutes are involved in this case: Section 118 of the Civil Rights Act of 1991, Pub. Law 102-166, reprinted in Appendix D at 37a-42a; and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, which is set forth in relevant portion below.

Federal Arbitration Act, 9 U.S.C. § 2 (1994):

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Arbitration will occur in this case only because Petitioner's employer required her to sign a mandatory arbitration agreement as a condition of employment in her chosen profession. Without this requirement, Petitioner would litigate her Title VII claims in federal court without having to pay expensive filing fees or any costs for the judge or jury. Also, she would appear before an Article III judge who was required to follow case precedent or statutory law. Whether this type of arbitration agreement is lawful depends upon the law of the circuit in which an employee litigates her case. Thus, two workers for the same national company can sign the same mandatory arbitration agreement but it may be deemed enforceable against one employee but not the other depending on where they choose to file suit. Because the issue affects workers in virtually every industry in this country and hinders their ability to enforce their rights under the civil rights laws, it is of critical importance to the nation and in need of clarification by the Supreme Court. It is also an important question to employers who choose to compel workers to arbitrate discrimination claims but desire guidance as to the lawfulness of their policies.

I. The Arbitration Agreement

Petitioner worked for SBC and one of its predecessor companies from 1986 until 1996. (CR[1] 3 ¶ 2 (Plaintiff's Amended Complaint)). On February 2, 1995, Petitioner was required to sign an agreement to arbitrate her employment discrimination claims as a condition of her employment as a

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[1] "CR" refers to the docket number in the court record below.

securities trader. In Petitioner's case, she was required to register with five different exchanges, the New York Stock Exchange ("NYSE"), the National Association of Securities Dealers ("NASD"), the Chicago Board of Options Exchange ("CBOE"), the Philadelphia Stock Exchange ("PHLX"), and the Pacific Stock Exchange ("PSE"). *Id.* ¶¶ 19-22. Each exchange required registrants to arbitrate disputes with their employer, at the employer's option. *Id.* ¶ 21. When Petitioner registered with the exchanges, she lacked any knowledge of the workings, or inadequacies, of the securities industry arbitral fora. *Id.* ¶ 73. Even if she had known of these adequacies, however, Petitioner had no choice about whether to sign the arbitration agreement. *Id.* ¶ 22. In addition, the language of the arbitration agreement was non-negotiable.

II. Petitioner's Complaint

Petitioner timely filed a charge of discrimination with the Equal Employment Opportunity Commission on June 28, 1996, received her Right to Sue letter, and filed her Complaint in federal court on April 1, 1997. (CR 3, Ex. A). Petitioner's Amended Complaint, filed April 22, 1997, sought relief under 42 U.S.C. § 2000e *et seq.* (1994) ("Title VII"), the Equal Pay Act, and the New York Human Rights Law. *Id.* ¶¶ 36-58. Petitioner also challenged the securities industry's use of compulsory arbitration of statutory discrimination claims and sought a declaratory judgment that such mandatory arbitration violated the Constitution and Title VII. Petitioner alleged, among other specific charges, that securities industry arbitration deprived Title VII litigants of their rights because: 1) securities industry arbitrators routinely impose the cost of arbitration on litigants, even when they prevail, including forum fees that can amount to tens of thousands of dollars; 2) securities industry arbitrators

are expressly instructed that they are not required to follow case precedent or statutory law; 3) securities industry arbitrators are discouraged from issuing written findings and conclusions in order to shield their decisions from meaningful judicial review; 4) securities industry arbitrators are not neutral; and 5) securities industry arbitrators routinely fail to implement Title VII's provisions, including fee-shifting and punitive damages provisions. *Id.* ¶¶ 59-71.

III. Record Evidence

Although Petitioner sought to take additional discovery regarding the adequacy of the arbitral forum, the undisputed record evidence did include excerpts from the NYSE, Department of Arbitration, Arbitration Rules, Art. IX ("NYSE Rules") and the NASD Code of Arbitration Procedure (July 1995) ("NASD Code"). (CR 11, Ex. K) (Plaintiff's Response to Defendant's Supplemental Motion to Dismiss, Ex. K. which was *Merrill Lynch and Joseph Ganotti's Response to Plaintiff's Motion for Leave to File Supplemental Authority*, filed in *Cremin et al. v. Merrill Lynch Pierce Fenner & Smith, Inc. et al*, No. 96 C 3773 (N.D. Ill.) (Castillo, J.), which attached NYSE Department of Arbitration, Arbitration Rules, Art. XI, R.628 and NASD, Code of Arbitration Procedure, §§ 44-45). Among the excerpts from the NASD Code was Section 44, the Schedule of Fees for Industry and Clearing Controversies. *Id.* Section 44 requires, *inter alia*, that at the time of filing her claim, a claimant must pay a non-refundable filing fee and a hearing session deposit. The filing fee is $500. The hearing session deposit, which is ultimately applied against forum fees (for which the claimant is potentially responsible), is determined by the amount in dispute. *Id.* Thus, before the commencement of a hearing, a claimant is required to select the value of her case, designate an amount in dispute, and pay

the corresponding fee. *Id.* For example, if a claimant values her case between $10,000 and $100,000 she must pay a filing fee of $500 and a hearing session deposit of $600. To ensure, at a minimum, the availability of statutory Title VII caps, a claimant must pay a hearing session deposit of $750. To allow for a recovery between $500,000 to $5,000,000, the requisite hearing session deposit is $1,000. (CR 11, Ex. K) (NASD Code § 44(i)). The hearing session deposit is determined on a per session basis. When multiple sessions are required, the arbitrator(s) may require additional hearing session deposits for each session. (CR 11, Ex. K) (NASD Code § 44(a)). The record evidence also established that the fee schedule of the NASD was comparable to the fee schedules of the NYSE. *Compare* CR 11, Ex. K, NYSE Rule 629(h-i) *with* CR 11, Ex. K, NASD Code § 44(i).

The undisputed record evidence also included evidence of actual decisions of NYSE arbitration panels. (CR 11, Ex. J). In cases in which the arbitrators found for the claimant, the forum fees assessed to the claimant ranged from $0 to $41,400. *Id.* In cases in which the arbitrators found in favor of the respondent, the forum fees assessed to the claimant ranged from $0 to $12,000. *Id.*

Finally, the undisputed record evidence included Securities Industry Conference on Arbitration (SICA) Arbitrator's Manual (1996) ("SICA Arbitrator's Manual"). (CR 11, Ex. I). The manual provides that arbitrators are "not strictly bound by case precedent or statutory law." *Id.* at 26.

IV. The District Court's Order

SBC moved to dismiss Petitioner's Complaint and to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1994) ("FAA"), relying extensively on

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). (CR 4). After briefing and oral argument, the District Court denied SBC's motion to compel arbitration and concluded that "the discovery sought by plaintiff is appropriate before a decision can be reached on the arbitration issue." Pet'r's App. 19a.

V. The Court of Appeals' Decision

The Seventh Circuit reversed the District Court, holding that Petitioner's Title VII claims were subject to mandatory arbitration, defined as "the contractual situation where if one party to a dispute requests arbitration, the other party is obliged to arbitrate." 167 F.3d at 362. Beginning with an analysis of the FAA and *Gilmer*, the Court found that arbitration of statutory discrimination claims could be limited in only three situations: 1) if Congress has indicated its intention to preclude waiver of judicial remedies for the rights at issue; 2) if there is a defect in contract formation; or 3) if the particular arbitration proceedings are inadequate. *Id.* at 363-65. The Court found that in passing the Civil Rights Act of 1991 ("1991 Act"), Congress did not intend Title VII to preclude use of pre-dispute mandatory arbitration agreements. *Id.* at 365. The Court rejected Petitioner's remaining arguments and held that Petitioner's claims were subject to mandatory arbitration. *Id.* at 369.

REASONS FOR GRANTING THE PETITION

I. SUPREME COURT REVIEW IS NECESSARY TO RESOLVE CIRCUIT CONFLICT REGARDING AN IMPORTANT ISSUE OF LAW

The Seventh Circuit's Order requires Petitioner to arbitrate her claims in a forum accessible only to those who, though possibly unemployed, nevertheless have the financial means to pay an expensive filing fee and potentially punishing forum fees. In addition, given that these forum fees are not assessed until the conclusion of the case, Petitioner cannot intelligently assess the risks of litigation before undertaking the daunting task of vindicating her civil rights.

The chilling effect of an arbitral system denying meaningful access to a forum where an individual may seek enforcement of the law is apparent. The civil rights laws were designed to counter, among other things, the otherwise gross disparity in bargaining power between an employee and her employer. Accessibility to taxpayer supported courts where a litigant's claims can be heard by a judge or jury for the cost of a reasonable filing fee is a critical factor in sustaining the leveling impact of the civil rights laws. This leveling of power is undone where an individual must, in addition to taking on a powerful employer, pay dearly for access to the forum in which to do so. Equally important to Title VII's remedial scheme is its fee-shifting provisions. But the arbitral system involved in this case instructs its arbitrators that they are not required to follow case precedent or statutory law. As the Congressional findings supporting the enactment of Title VII confirm, many of the nation's workers will be unable to assume the financial risk required by an arbitral system, such as the one at issue in this case, and

will simply forego vindicating their civil rights claims. Because that result would significantly harm our country's efforts to eradicate discrimination, the Order of the Seventh Circuit must be reversed.

A. Mandatory Arbitration Agreements that Impose Expensive Filing Fees and Uncapped Forum Fees on Employees Are Unenforceable and Inconsistent with Federal Policy

As explained below, there is circuit conflict on the issue of whether an arbitral forum that requires employees to pay expensive filing or forum fees is consistent with the FAA and Title VII.

Several circuits hold, contrary to the holding in this case, that employees may not be required to pay significant fees to vindicate their statutory rights under Title VII. *Shankle v. B-G Maintenance Management*, 163 F.3d 1230 (10th Cir. 1999); *Paladino v. Avnet Comp. Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns Int'l Sec. Svcs.*, 105 F.3d 1465 (D.C. Cir. 1997). Recently, in striking down a mandatory arbitration agreement that required an employee to pay expensive fees, the Tenth Circuit explained:

> The Agreement thus placed Mr. Shankle between the proverbial rock and a hard place – it prohibited the use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum. *See Cole* [*v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997)] (concluding employees would be unable to pursue statutory

> claims if required to pay for arbitrator fees in addition to the administrative costs and attorneys fees, which accompany both arbitration and litigation). Essentially B-G Maintenance required Mr. Shankle to agree to mandatory arbitration as a term of continued employment, yet failed to provide an accessible forum in which he could resolve his statutory rights. Such a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws. [Citations omitted].

Shankle, 163 F.3d at 1235. In addition, *Duffield v. Robertson, Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, --- U.S. ---, 119 S. Ct. 445 (1998) holds that employers may not require as a condition of employment that prospective employees waive their rights to bring Title VII claims in court. Therefore, it necessarily is true that persons who file claims in the Ninth Circuit cannot be compelled to an involuntarily arbitration that requires the payment of substantial filing and forum fees and does not adequately guarantee the protection of statutory rights.

Conversely, in *Rosenberg v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999), the First Circuit expressly rejected an employee's argument that the same mandatory arbitration agreement at issue in this case is impermissible if it imposes forum fees, which may be as high as $3,000 per day and tens of thousands of dollars per case. Likewise, relying on the First Circuit's decision in *Rosenberg*, the Seventh Circuit in this case rejected Petitioner's argument that the arbitral forum failed to protect her statutory rights because of the imposition of the same forum fees. The Court adopted *Rosenberg's* reasoning: "[I]t

does not appear to be the usual situation that a plaintiff is asked to bear forum fees..." and "...if unreasonable fees were to be imposed on a particular employee, the argument that this was inconsistent with the 1991 Act could be presented by the employee to the reviewing court." *Koveleskie v. SBC Capital Mkts.*, 167 F.3d 361, 366 (7th Cir. 1999). Similarly, in *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998), *cert. denied*, --- U.S. ---, 119 S. Ct. 1028 (1999), the Third Circuit upheld a compulsory arbitration agreement that is identical to the one at issue in this case. Thus, these circuits do not find that mandatory arbitral processes exposing civil rights litigants to payment of expensive fees violate the FAA or Title VII.

The holdings of the First, Third and Seventh Circuits are not only at odds with the decisions of the Ninth, Tenth, Eleventh and D.C. Circuits; they reflect an indifference to the rights of workers who must decide whether to submit claims to an arbitral forum, thereby risking exposure to expensive forum fees or forego vindicating their civil rights. For these workers, the harm is done by knowing that the fees may be imposed. Clearly, the possibility that expensive fees may be assessed against a worker who has lost her job and is without gainful employment will chill her willingness to arbitrate her discrimination claims. Whether these fees ultimately will be assessed against her is not relevant; it is the possibility that they could be assessed that chills claim filing. As the Tenth Circuit held in *Shankle*, the absence of an affordable process renders the arbitral forum inadequate and undermines the remedial and deterrent functions of the civil rights laws.

Shankle, 163 F.3d at 1234.[2]

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[2] In adopting *Rosenberg's* finding that it does not appear to be the usual situation that a plaintiff is asked to bear forum fees, the Seventh Circuit ignored the record evidence. To reach this holding both circuits cite *Cole* for the proposition that the securities industry arbitration system does not require employees to pay for the arbitrator to hear their statutory claims. *Cole*, 105 F.3d at 1483; *Rosenberg*, 170 F.3d at 44-46; *Koveleskie*, 167 F.3d at 366. *Cole*, however was not a securities industry case, and any comments the Court made about the securities industry arbitral forum were dicta.

Further, the Seventh Circuit had sufficient record evidence to reject the dicta in *Cole*. First, the record evidence included an admission from the largest brokerage firm in the country, Merrill Lynch Pierce Fenner & Smith, Inc. that:

> The Court in *Cole* is incorrect in one respect: when it states that under NYSE Rules and NASD Rules it is standard practice in the securities industry for employers to pay all of the arbitrator's fees. NYSE Arbitration Rule 629(b) and (c) and NASD Code of Arbitration Procedure Section 44(b) and (c) provide for the payment of forum fees. They also provide that the arbitrators, in their award, may determine the amount chargeable to each party as forum fees and shall determine who shall pay such forum fees.

(CR 11, Ex. K ¶9).

Second, the record evidence included actual arbitration awards in which employees were required to pay substantial forum fees, even when they prevailed. (CR 11, Ex. J). Thus, there was no basis for the Seventh Circuit to adopt *Rosenberg's* holding.

Likewise, a civil rights plaintiff will also find little comfort in the First and Seventh Circuits' assurance that if unreasonable fees were to be imposed on a particular employee, she may appeal the imposition of fees as being unreasonable to the reviewing court.

In particular, the standard for vacating an arbitration decision is "'manifest disregard' of the law." *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 942 (1995). Such a standard, in practice, does not provide for meaningful review. See *Eljer Mfg., Inc. v. Kowin Dev. Corp.,* 14 F.3d 1250, 1255 (7th Cir. 1994) ("The arbitrator must have *deliberately* disregarded what he *knew* to be the law") (emphasis added), *cert. denied,* 512 U.S. 1205 (1995); *Montes v. Shearson Lehman Bros., Inc.,* 128 F.3d 1456, 1458-59 (11th Cir. 1997) (reversing arbitration award only where award was completely unsupported by facts, winning party conceded that its position was not supported by law, winning party explicitly and repeatedly urged arbitrators not to follow the law and reminded the arbitrators that the law did not bind them, and record gave no indication that arbitrators rejected that urging); *DiRussa v. Dean Witter Reynolds, Inc.,* 121 F.3d 818, 822 (2nd Cir. 1997) (failure to pay statutory fees not grounds for overturning award in absence of "persuasive evidence that the arbitrators actually knew of – and intentionally disregarded – the mandatory aspect of the ADEA's fee provision"), *cert. denied,* --- U.S. ---, 118 S. Ct. 695 (1998).

While a civil rights plaintiff who seeks review of an arbitration award at the district court may also seek review of that decision at the appellate court, that process can be even more cost-prohibitive and is no justification for arbitration. For example, in *Halligan v. Piper Jaffray, Inc.,* 148 F.3d 197 (2d Cir. 1998), *cert. denied,* --- U.S. ---, 119 S. Ct. 1286

(1999), one of the rare cases where the standard of "manifest disregard of the law" was met, the Court of Appeals reversed the District Court's order affirming an arbitration award in favor of the employer. The arbitration proceedings in that case were extensive and lasted approximately two and a half years. The result of the Court's finding, however, was that the plaintiff had to start his proceedings over and assume responsibility for even more costs.

Consequently, civil rights plaintiffs understandably would rarely initiate arbitration proceedings if left in the untenable position of having to plan at the outset to incur further expense in appeals to challenge a decision imposing unreasonable fees on them. For that reason, the holdings of the Ninth, Tenth, Eleventh and D.C. circuits are correct, but the holdings of the First, Third and Seventh Circuits must be overturned.

B. Compelling an Employee to Arbitrate Discrimination Claims before an Arbitral Forum that Instructs its Arbitrators that They are Not Required to Follow Case Precedent or Statutory Law Prevents Civil Rights Litigants From Effectively Vindicating Their Statutory Rights

In conjunction with the exorbitant cost of securities arbitration, the arbitral system upheld in this case is fundamentally flawed because it is undisputed that arbitrators are expressly instructed that they are not required to follow "case precedent or statutory law" in deciding employment cases. This directive applies to the fee-shifting statutes that Congress deemed essential to the enforcement of our nation's civil rights laws. Such circumstances further conflict with *Gilmer's* assumption that "by agreeing to arbitrate a statutory

claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26. Indeed, the directive given to securities industry arbitrators explicitly excuses them from any obligation to apply Congress' carefully-developed Title VII statutory standards, or to consider the extensive case law construing those often complex standards.

The Seventh Circuit, while acknowledging that securities industry arbitrators are not bound by legal precedent, was mollified by the fact that arbitration awards may be appealed and vacated if they manifestly disregard the law. 167 F.3d at 366. So, too, did the First Circuit indicate its acceptance of the review mechanism as a means to ensure that arbitrators comply with statutory requirements. *Rosenberg*, 170 F.3d at 46.

In contrast, it is likely that courts rejecting mandatory arbitration on various grounds also would reject the approach taken by the First and Seventh Circuits regarding instructions given to arbitrators. Naturally, the Ninth Circuit would reject such an approach because its opinion in *Duffield* squarely rejects securities industry mandatory arbitration altogether on the grounds that it requires persons to surrender rights to litigate future Title VII claims in court. Similarly, the premise of *Shankle* and *Paladino* is that arbitration agreements that prevent individuals from effectively vindicating their statutory rights are unenforceable. *See also Hooters of Am., Inc. v. Phillips*, --- F.3d ---, 79 Fair Empl. Prac. Cas. (BNA) 629, 1999 WL 194438 (4th Cir. Apr. 8, 1999) (refusing to enforce mandatory arbitration agreement that clearly was biased in favor of the employer), reprinted at Appendix C at 21a-36a. The shared reasoning among these decisions is that arbitration is not lawful where the system is

incapable of allowing plaintiffs to vindicate their civil rights. Nowhere is the failure of the system more clear than in the procedure of instructing arbitrators that they are not bound by case precedent or statutory law. In sum, the approach taken by the First, Third and Seventh Circuits diverges from that taken by other circuits, including the Fourth, Ninth, Tenth and Eleventh.

Moreover, the approach of the First and Seventh Circuits that an appellate review can cure any deficiencies creates a chilling effect on civil rights plaintiffs. Again, as discussed above, the standard for vacating an arbitration decision is "'manifest disregard' of the law." *First Options of Chicago, Inc.* 514 U.S. at 942. Such a standard, in practice, does not provide for meaningful review. *See Eljer Mfg., Inc.*, 14 F.3d at 1255 ("The arbitrator must have *deliberately* disregarded what he *knew* to be the law") (emphasis added); *Montes*, 128 F.3d at 1458-59 (reversing arbitration award only where award was completely unsupported by facts, winning party conceded that its position was not supported by law, winning party explicitly and repeatedly urged arbitrators not to follow the law and reminded them that the law did not bind them, and record gave no indication that arbitrators rejected that urging); *DiRussa*, 121 F.3d at 822 (failure to pay statutory fees not grounds for overturning award in absence of "persuasive evidence that the arbitrators actually knew of – and intentionally disregarded – the mandatory aspect of the ADEA's fee provision").

In light of the foregoing, Petitioner submits that her petition raises issues that affect the interests of all workers. The issues delineated above were well developed in the District Court and Court of Appeals. Given the breadth of the issue, its application to thousands of workers across the

country, and the frequency with which this issue will arise, Petitioner respectfully requests that the Court grant her petition.

II. AN ARIBTRATION SYSTEM THAT REQUIRES AN EMPLOYEE TO PAY EXPENSIVE FILING FEES AND UNCAPPED FORUM FEES AND INSTRUCTS ARBITRATORS THAT THEY ARE "NOT STRICTLY BOUND BY CASE PRECEDENT OR STATUTORY LAW" IS INCONSISTENT WITH THE CIVIL RIGHTS ACT OF 1991

The legislative history of the Civil Rights Act of 1991 provides further support that the arbitration agreement at issue in this case violates Title VII. The 1991 Act was enacted to "strengthen" the anti-discrimination protections of Title VII by making it easier for victims of discrimination to bring their cases and to prove their claims. *See* H.R. Rep. No. 40(I) 14, 102d Cong. 1st Sess., *reprinted in* 1991 U.S.C.C.A.N 549, 552; H.R. Rep. No. 40(II) at 1-4, 102d Cong., 1st Sess. 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694-96. The Act sought to accomplish these goals by overruling a series of restrictive Supreme Court decisions issued two years earlier, adding a right to damages and trial by jury, and expanding Title VII's fee-shifting provisions. *Id.* Congress made clear that the 1991 Act should be liberally construed in favor of the victims of discrimination, stating that "[w]hen the terms of [the] statute are susceptible to several alternative interpretations, the courts, consistent with the intent of Congress, are to select the construction which most effectively advances the underlying congressional purpose." H.R. Rep. No. 40(I) 88, *reprinted in* 1991 U.S.C.C.A.N 626; *id.* at 87,

1991 U.S.C.C.A.N. 625 (statute should be given "the largest latitude consistent with the words employed").

In the 1991 Act, Congress encouraged the use "[w]here appropriate and to the extent authorized by law . . . of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration. . . ." 42 U.S.C. §1981a notes (1994) (quoting Pub. L. No. 102-166, §118, 105 Stat. 1071, 1081), *reprinted in* App. D at 37a. Notably, these are all consensual processes.

Many statements in the 1991 Act's legislative history demonstrate Congress's belief that the type of arbitration system endorsed by the Seventh Circuit here, namely one that imposes expensive fees on plaintiffs and instructs arbitrators that they are not required to follow the law, is neither appropriate nor authorized by law. The key House Committee on Education and Labor Report

> emphasize[d] . . . that the use of alternative dispute mechanisms is intended to supplement, not supplant, the remedies provided by Title VII [and to be] consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver* . . . The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.

H.R. Rep. No. 40(I)97, *reprinted in* 1991 U.S.C.C.A.N. 635. That report also stated explicitly that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking

relief under the enforcement provisions of Title VII." *Id.*; *accord* H.R. Conf. Rep. No. 755, 101st Cong., 2d Sess. 26 (1990) (conference report on previous bill containing identical language: "any agreement to submit disputed issues to arbitration . . . in an employment contract does not preclude the affected person from seeking relief under the enforcement provisions of Title VII").

It is clear that given the legislative history and remedial purposes of the 1991 Civil Rights Act, a system that imposes expensive fees on plaintiffs and instructs arbitrators that they are not required to follow case precedent or statutory law as part and parcel of a mandatory arbitration agreement is one that supplants Title VII remedies rather than supplements them. The Seventh Circuit erroneously held that such a system was appropriate and authorized by law and should be reversed for that reason.

CONCLUSION

For all of the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

/s/_____
Mary Stowell
(*Counsel of Record*)
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May 5, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed February 4, 1999]

No. 98-1793

MARY KOVELESKIE *Plaintiff-Appellee*,	)
v.	)
SBC CAPITAL MARKETS, INC. a/k/a SBC WARBURG, INC., *Defendant-Appellant*.	)

OPINION

Argued November 12, 1998
Decided February 4, 1999

Before FLAUM, EASTERBROOK and KANNE, Circuit Judges.

FLAUM, Circuit Judge.

SBC Capital Markets, Inc. ("SBC") appeals from the district court's denial of its motion to dismiss and to compel arbitration of Mary Koveleskie's employment-related sexual discrimination claims under Title VII of the Civil Right Act

of 1964 ("Title VII"), 42 U.S.C. §§ 2000 et seq. We now reverse and remand, holding that Title VII claims can be subject to mandatory arbitration and that the parties' agreement to arbitrate is an enforceable contract. In the context of this opinion, we employ the term "mandatory arbitration" to reflect the contractual situation where if one party to a dispute requests arbitration, the other party is obliged to arbitrate.

I. BACKGROUND

Mary Koveleskie worked for SBC and one of its predecessor companies from 1986 until 1996, when she resigned, claiming constructive discharge. Koveleskie asserts that during her employment she was subjected to a continued pattern of unlawful sexual discrimination, the facts of which do not bear on this appeal. At the time of her resignation she held the title of Director and worked in a securities trading position.

Koveleskie's job required her to register as a securities representative with several securities exchanges or organizations ("exchanges" or "SROs"), using the securities industry's "Form U-4." In 1995, Koveleskie signed the Form U-4, registering with five SROs: the New York Stock Exchange ("NYSE"), the National Association of Securities Dealers ("NASD"), the Chicago Board of Options Exchange ("CBOE"), the Philadelphia Stock Exchange ("PHLX") and the Pacific Stock Exchange ("PSE"). The Form U-4 required, among other things, that a securities trader arbitrate before a panel of securities industry arbitrators any dispute with his or her employer that had to be arbitrated under the rules of the exchanges of which the employer is a member. The rules of

all of the SROs Koveleskie registered with required arbitration of all disputes, including employment disputes, between members, like SBC, and registered representatives, like Koveleskie. [FN1]

> FN1. The SEC has recently approved changes to NASD and NYSE arbitration rules creating an exception to mandatory arbitration of employment disputes. According to the amendments, statutory employment-related discrimination claims are arbitrable if the parties agree to arbitration after the dispute has been raised, but, absent such agreement, arbitration is not compulsory. The NASD rule change went into effect January 1, 1999 and applies to claims filed on or after that date. See SEC Rel. No. 34-40109, 63 Fed.Reg. 35299, 1998 WL 339422. The NYSE rule change was approved by the SEC on December 29, 1998 and is silent on the issue of retroactivity. See SEC Rel. 34-40858, 64 Fed.Reg. 1051, 1999 WL 3315. Thus, these rule changes have no impact on the present litigation, especially in light of the fact that Ms. Koveleskie registered with three other SROs that have not amended their arbitration rules.

Koveleskie filed a charge with the EEOC on June 28, 1996, received a right to sue letter, and filed this action in federal court on April 1, 1997. Koveleskie sought relief under Title VII, the Equal Pay Act and the New York Human Rights Law for sexual discrimination, sexual harassment, wage discrimination and retaliation. She also sought to invalidate the mandatory arbitration clause applicable through the Form U-4, and she sought a declaratory judgment that mandatory

arbitration of discrimination claims under existing securities industry procedures violates the Constitution and Title VII.

SBC moved to dismiss the complaint and to compel arbitration. In a minute order, the district court refused to compel arbitration, concluding that "under recent authority, the discovery sought by plaintiff is appropriate before a decision can be reached on the arbitration issue."

II. DISCUSSION

[1] As an initial matter, we find jurisdiction for this appeal under section 16(a)(1)(C) of the Federal Arbitration Act ("FAA"), which provides that appeal may be taken from an order denying a motion to compel arbitration. 9 U.S.C. § 16(a)(1)(C). While the district court's order stated that discovery was needed "before a decision can be reached on the arbitration issue," there is no doubt from the record that the district court denied the defendant's motion and clearly meant to foreclose arbitration. Thus, in such a setting, this appeal was appropriate under the FAA. We acknowledge that our finding of jurisdiction is in disagreement with the Ninth Circuit, which recently held that all contracts of employment are outside the scope of the FAA. See Craft v. Campbell Soup Co., 161 F.3d 1199 (9th Cir.1998). However, other circuits which have addressed this issue, see McWilliams v. Logicon, Inc., 143 F.3d 573, 576 (10th Cir.1998); O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274 (4th Cir.1997); Cole v. Burns International Security Services, 105 F.3d 1465 (D.C.Cir.1997); Rojas v. TK Communications, Inc., 87 F.3d 745, 747-48 (5th Cir.1996); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 596- 601 (6th Cir.1995); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d

Cir.1972); Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir.1971), have concluded, as we have, see Pryner v. Tractor Supply Co., 109 F.3d 354, 358 (7th Cir.1997); Briggs & Stratton Corp. v. Local 232, International Union, Allied Industrial Workers of America (AFL-CIO), 36 F.3d 712, 714-15 (7th Cir.1994); Pietro Scalzitti Co. v. Operating Engineers, 351 F.2d 576 (7th Cir.1965), that such employment contracts are not excluded from the purview of the FAA.

Koveleskie argues that arbitration of her discrimination claims is improper because (1) Congress intended to preclude Title VII claims from the FAA, 9 U.S.C. § 1 et seq.; (2) the arbitration agreement is an unconscionable contract of adhesion; (3) the securities industry arbitration procedures are inadequate to protect the rights of a civil rights plaintiff and (4) the agreement violates the "unconstitutional conditions" doctrine.

A. Title VII and the FAA.

[2] The Federal Arbitration Act provides that predispute arbitration is enforceable and valid. The plaintiff argues that its use is prohibited in the Title VII setting. In order to resolve this challenge, we must consider whether Congress intended Title VII to preclude the use of pre-dispute arbitration agreements. If not, the FAA's presumption in favor of arbitrability applies to Title VII claims.

Section 118 of the 1991 Civil Rights Act (the "CRA"), passed on November 21, 1991, provides that "Where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including ... arbitration, is

encouraged to resolve disputes arising under [Title VII]." Koveleskie argues that the language and legislative history of the CRA indicate that Congress did not intend to authorize compelled, involuntary arbitration in discrimination cases. However, the weight of authority strongly suggests otherwise.

In Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), which involved a claim of age discrimination brought under the Age Discrimination in Employment Act ("ADEA"), the Supreme Court held that the FAA required the enforcement of the pre-dispute mandatory enforcement clause in a Form U-4 identical to the one signed by Koveleskie. When his employer sought to compel arbitration of Gilmer's ADEA claims, Gilmer challenged the application of arbitration to statutory civil rights claims. Id. The Court, noting that there was no reason to treat civil rights statutes any differently than other important statutes that may be the subject of enforceable arbitration agreements, held that pre-dispute arbitration clauses should be enforced unless the plaintiff showed that Congress specifically intended to preclude arbitration. Id. at 26, 111 S.Ct. 1647.

In holding that statutory discrimination claims could be the subject of enforceable arbitration clauses, the Gilmer Court stated that arbitration of such claims may be limited in three situations. First, if Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue, an arbitration agreement will not be enforced. Thus, the court must determine if the statute at issue precludes arbitration. The party challenging arbitration has the burden of showing that it is precluded. Second, an arbitration agreement may be challenged if there was a defect in contract

formation (discussed below). Third, Gilmer left open the possibility that a plaintiff could challenge the adequacy of particular arbitration proceedings (discussed below).

Courts after Gilmer have routinely endorsed arbitration of discrimination claims, including those brought pursuant to Title VII. For instance, in a recent decision, the First Circuit held that Title VII does not, as a matter of law, prohibit pre-dispute arbitration agreements. See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 163 F.3d 53 (1st Cir.1998). Rosenberg held that "neither the language of the statute nor the legislative history demonstrates an intent in the 1991 CRA to preclude pre- dispute arbitration agreements." Id. at 63. Moreover, the Rosenberg court concluded that mandatory arbitration was not at odds with the structure and purpose of the 1991 CRA, noting that "[i]t is difficult to see why the purposes of Title VII present a stronger case for rejecting arbitration than do the purposes of ... the ADEA ..." which was construed by the Supreme Court in Gilmer not to preclude arbitration. Id. at 63.

In another recent case involving a Form U-4 arbitration clause, the Third Circuit concluded that § 118 of the CRA endorsed arbitration on its face, and that "no amount of commentary from individual legislators or committees would justify a court in reaching the result" urged by the plaintiff in this case. Seus v. John Nuveen & Co., 146 F.3d 175, 182 (3d Cir.1998). See also Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir.1991) (holding that Title VII claims were subject to an arbitration clause based on a Form U-4); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir.1997) (holding that Title VII claims are subject to pre-dispute arbitration agreements under the FAA); Cole

v. Burns International Security Services, 105 F.3d 1465 (D.C.Cir.1997) (affirming an order compelling arbitration of Title VII claims where an employee signed a mandatory arbitration agreement as a condition of his employment); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir.1994) (holding that Title VII claims are subject to mandatory arbitration); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir.1992) (holding that Title VII claims are subject to securities industry compulsory arbitration); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir.1991) (holding that Title VII claims can be subject to compulsory arbitration).

To support her argument that Congress, through the 1991 CRA, intended to preclude arbitration of Title VII claims, the plaintiff relies on a recent Ninth Circuit case, Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir.1998), in which that court refused to enforce a Form U-4 arbitration clause. In Duffield, the court found ambiguity in § 118's language that "[w]here appropriate and to the extent authorized by law" arbitration is encouraged. Id. at 1193-94. After examining the legislative history, context and text of the CRA, the Ninth Circuit concluded that Congress intended to preclude compulsory arbitration of Title VII claims. Id.

We respectfully disagree with the Ninth Circuit on this issue, and instead concur with the majority of circuits that have held that Congress did not intend Title VII to preclude enforcement of pre-dispute arbitration agreements such as the one signed by Koveleskie. Specifically, we conclude, as did the Third Circuit, that "[o]n its face, the text of § 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration," and

that, with regard to the "authorized by law" language of the 1991 CRA, "it seems most reasonable to read this clause as a reference to the FAA." Seus, 146 F.3d at 183.

B. Adequacy of Securities Industry Procedures.

[3] The plaintiff argues that securities industry arbitration procedures are inadequate because they fail to protect statutory rights and benefits and unfairly disfavor plaintiffs. In Gilmer, where the plaintiff raised the identical issue, the Court noted that "the NYSE arbitration rules ... provide protections against biased panels," and held that Gilmer had failed to show actual bias. 500 U.S. at 30, 111 S.Ct. 1647. However, the Court held that future plaintiffs might be able to demonstrate "procedural inadequacies in specific cases." Id. at 33, 111 S.Ct. 1647.

The plaintiff argues that securities industry arbitration is biased in three ways. All three of her challenges to the adequacy of securities industry arbitration procedures have been rejected by the Supreme Court and lower courts. First, Koveleskie claims that because securities industry arbitrators are not required to follow the law, plaintiffs are deprived of their rights and protections. However, while arbitrators are instructed in their Manual that they are not "strictly bound by case precedent or statutory law," they "are also told that if they manifestly disregard the law, the award may be vacated." Illyes v. John Nuveen & Company, Inc., 949 F.Supp. 580, 584 (N.D.Ill.1996) (holding that an employee's discrimination claims were subject to mandatory arbitration).

Second, the plaintiff argues that the securities industry arbitrators routinely fail to follow Title VII's fee-shifting

principle by refusing to award statutory attorneys' fees to prevailing plaintiffs and by charging plaintiffs expensive forum fees. This argument was explicitly rejected by the First Circuit in Rosenberg:

> First, that arbitrators may sometimes do undesirable things in individual cases does not mean that the arbitral system is inadequate
>
> ...
>
> Second ... it does not appear to be the usual situation that a plaintiff is asked to bear forum fees
>
> ...
>
> Third, if unreasonable fees were to be imposed on a particular employee, the argument that this was inconsistent with the 1991 CRA could be presented by the employee to the reviewing court.

163 F.3d at 68. Moreover, the court noted that arbitration is often more affordable to plaintiffs and defendants than litigating a claim in court. Id. at 68. In fact, under NYSE and NASD rules, it is standard practice in the securities industry for employers to pay all of the arbitrators' fees. See Cole v. Burns International Security Services, 105 F.3d 1465, 1483 (D.C.Cir.1997) (holding that an agreement to arbitrate applied to statutory discrimination claims but the employer could not require the employee to pay for all or part of the arbitrator's fees). The Cole court also noted that even when employees are required to pay a filing fee, expenses or an administrative fee, these fees are often waived because of hardship. Id. at 1483-84.

Third, Koveleskie argues that judicial review is not available to provide meaningful oversight of the securities industry arbitration process because arbitration awards, unlike judicial decisions, are not reviewable for statutory error and cannot be reversed on the ground that the arbitrators did not correctly apply Title VII principles. However, Gilmer held that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to insure that arbitrators comply with the requirements of the statute at issue." 500 U.S. at 32, 111 S.Ct. 1647. In addressing an identical challenge to the adequacy of judicial review of arbitration decisions, the D.C. Circuit found that "judicial review of arbitration awards is necessarily focused, but that does not mean that meaningful review is unavailable." Cole, 105 F.3d at 1486. The court noted both the text of the FAA, which provides a non-exclusive list of grounds on which an arbitration award may be vacated, and language from the Supreme Court indicating that arbitration awards may be vacated if they are in "manifest disregard of the law." Id. at 1486 (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). Based on the reasoning of this authority, we are convinced that judicial review of arbitration awards is sufficient to protect statutory rights.

Gilmer left open a door for plaintiffs to challenge mandatory arbitration of statutory claims by showing that arbitration system is structurally biased. However, we hold that Koveleskie has failed to show actual bias in the securities arbitration process.

C. Contract Law.

[4] Koveleskie next argues that because she was required to sign the Form U- 4 as a condition of her employment, the arbitration clause created an unconscionable contract of adhesion and should be voided. We reject this argument, as have numerous courts, including the Supreme Court. Most recently, the First Circuit held in Rosenberg that the mandatory arbitration agreement contained in the Form U-4 does not create an unconscionable contract of adhesion. 163 F.3d at 68.

It is true that Koveleskie was required by her employer to register with several exchanges, and that by signing the Form U-4 she was bound by the SROs' mandatory arbitration rules. According to the plaintiff, such conditions created a take-it-or-leave-it contract situation, and placed her in a position of reduced bargaining power vis-a-vis her employer.

[5] An agreement to arbitrate is treated like any other contract: "In determining whether a valid agreement arose between the parties, a federal court should look to the state law that ordinarily governs the formation of contracts." Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir.1997). In the present case, we look to the contract law of Illinois, the state where all relevant events in this dispute arose. Id. (citing First Options of Chicago, Inc., 514 U.S. at 944, 115 S.Ct. 1920).

[6] [7] Illinois law does not void contracts where parties have unequal bargaining power, even if a contract is a so-called "take-it-or-leave-it" deal and

> consent to [the] agreement is secured because of hard bargaining positions or the pressure of

> financial circumstances. Rather, the conduct of the party obtaining the advantage must be shown to be tainted with some degree of fraud or wrongdoing in order to have an agreement invalidated ... [T]he mere fact that a person enters into a contract as a result of the pressure of business circumstances ... is not sufficient.

Kewanee Prod. Credit Ass'n v. G. Larson & Sons Farms, 146 Ill.App.3d 301, 305, 99 Ill.Dec. 838, 496 N.E.2d 531, 534 (1986). The only alleged wrongdoing here is requiring arbitration as a condition of employment, but, applying Illinois law, this court has noted that driving a hard bargain is not a wrongful act. See Resolution Trust Corp. v. Ruggiero, 977 F.2d 309, 314 (7th Cir.1992). Nor does "the mere fact that one is in a difficult bargaining position invalidate a contract." Id. The plaintiff argues that as an individual employee rather than a business entity, she had no bargaining power. However, "the disparity in the size of the parties entering into the agreement ... without some wrongful use of that power," is not enough to render an arbitration agreement unenforceable. Alexander v. Standard Oil, 97 Ill.App.3d 809, 811, 53 Ill.Dec. 194, 423 N.E.2d 578, 580 (1981).

Even if Illinois law considered pre-dispute arbitration agreements unconscionable, the FAA would preempt such law. The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and the Supreme Court has held that if a state singles out arbitration agreements, either statutorily or judicially, by imposing restrictions separate from its general contract law, that state law is preempted by the FAA. See

Doctor's Associates v. Casarotto, 517 U.S. 681, 686-88, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

Our decision on this issue is in accord with other courts that have addressed it. First, in Gilmer, the Supreme Court specifically rejected the argument that the Form U-4 creates an unconscionable contract of adhesion because of the unequal bargaining power between the plaintiff and his employer. 500 U.S. at 33, 111 S.Ct. 1647. Similarly, in Seus, the Third Circuit found the Form U-4 to be a valid contract, because "[t]he terms of the Form U-4 that [the plaintiff] signed were not oppressive, unconscionable, or unreasonably favorable to either the NASD or [the defendant]." 146 F.3d at 184. Finally, the First Circuit, in Rosenberg, held that "[a]bsent a showing of fraud or oppressive conduct" the Form U-4 is not unenforceable on the grounds that it is an unconscionable contract of adhesion. 163 F.3d at 69. As there has been no showing of fraud, misconduct or wrongdoing on the part of SBC, there is no reason to invalidate this contract for unconscionability.

The present case is distinguishable from our decision in Gibson, which held that a lack of consideration rendered an employee's promise to submit claims to arbitration unenforceable. 121 F.3d 1126. In Gibson, the plaintiff signed a contract provided by her employer which stated "I agree to the grievance and arbitration provisions set forth in the Associates Policy Manual" (the "Manual"). Id. at 1128. The Manual, which was not given to Gibson at the time when she signed the contract, specifically stated that all disputes, including Title VII claims, were subject to arbitration, but also stated that "it does not constitute a contract or promise of any kind" on the part of the employer. Id. at 1128. Thus, the

employer was not bound by the Manual's terms. This court found, applying Indiana law, that because Gibson was not given a copy of the Manual at the time she signed the contract, and because she never signed the Manual, there was no consideration in the form of a promise by the employer in exchange for Gibson's agreement to arbitrate. Additionally, this court found that Gibson's promise to arbitrate was not supported by consideration in the form of her employer's promise to hire her or to continue to employ her. Id. at 1131.

In the present case, the plaintiff's contract with SBC was supported by adequate consideration. First, Koveleskie signed the Form U-4 in exchange for SBC's promise to employ her. Second, the Form U-4 at issue here bound both parties to the rules of the designated SROs and allowed arbitration at the insistence of either party.

D. Constitutional Arguments.

[8] [9] Koveleskie argues that mandatory securities industry arbitration under federally-compelled and SEC-approved procedures violates her rights under Article III, the Seventh Amendment and the Fifth Amendment based on the "unconstitutional conditions" doctrine. The unconstitutional conditions doctrine prohibits a private entity, acting pursuant to governmental mandate, from conditioning a worker's employment upon a waiver of that worker's constitutional rights. Board of County Commissioners v. Umbehr, 518 U.S. 668, 674, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996). This doctrine specifically requires governmental action inducing a waiver of rights. Id. Thus, without state action, there can be no violation.

The alleged state actor here is the SEC, but the SEC required registration with an exchange, not entry into an arbitration agreement. Some, but not all, exchanges require arbitration agreements. [FN2] The plaintiff registered with exchanges that required her to sign an arbitration agreement, but the SEC certainly did not mandate that she register with those exchanges. Perhaps her employer did, but SBC is not a state actor. Additionally, Koveleskie registered with SROs that required arbitration "at the insistence" or "request" of any party. [FN3] Thus, disputes between the parties are eligible for arbitration, but only if one of the parties to the agreement demands it. Parties are always free to agree not to make a demand, even if they sign a Form U-4. [FN4] In this case, the defendant, not the government, sought to compel arbitration, so there is no basis to find that Koveleskie was deprived of her rights because of government action.

> FN2. For instance the American Stock Exchange ("AMEX") does not require arbitration of disputes between associated members (like Koveleskie) and their firms (like SBC). See American Stock Exchange Rule 600(a), American Stock Exchange Guide (CCH) ¶ 9540, at 2811 (1991).
>
> FN3. NYSE Rule 347; NASD Rule 10201; CBOE Rule 18.1; PHLX Bylaws § 10-8 and PSE Rule 12.1.
>
> FN4. In fact, the defendant points out that plaintiff's counsel has negotiated an agreement with Merrill Lynch never to demand arbitration of employment disputes under exchange rules and has posted a web site publicizing that fact. See Merrill Lynch Class Action Web Site (visited January 13, 1999)

<http://www.classactionmerrill.com>.

[10][11] Even if one were to assume state action here, it is highly unlikely that any constitutional violation occurred. The right to an Article III forum is waivable, and Koveleskie waived this right by signing the Form U-4 and consenting to arbitration. See CFTC v. Schor, 478 U.S. 833, 848-49, 853-54, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986). Koveleskie argues that the arbitration agreement violates her Seventh Amendment right to a trial by jury, but the law is clear that there is no constitutional right to a jury trial outside of an Article III forum. Geldermann, Inc. v. CFTC, 836 F.2d 310, 323 (7th Cir.1987).

[12] The plaintiff also argues that the arbitration agreement violates her Fifth Amendment due process and equal protection rights because it denies her the right enjoyed by all other plaintiffs to have Title VII claims decided by a tribunal that is required to apply the statutory standards established by Congress and the courts. This argument relies on the notion that a non-Article III forum is inadequate to protect statutory rights, but that is simply not the case. It is true that "statutory rights require both a substantive protection and access to a neutral forum in which to enforce those protections." Cole, 105 F.3d at 1482. However, we are satisfied, as was the Court in Gilmer, that the arbitral forum adequately protects an employee's statutory rights, both substantively and procedurally. 500 U.S. at 28, 111 S.Ct. 1647; see also Cole, 105 F.3d at 1482; Seus, 146 F.3d at 180.

E. Equal Pay Act and New York Human Rights Law.

[13] Finally, Koveleskie's Equal Pay Act and New York Human Rights Law claims are arbitrable. Koveleskie has not argued that the FAA precludes arbitration of these claims because the Equal Pay Act or the New York Human Rights Law are exempted from the FAA. Therefore, these claims must be arbitrated. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (district court has no discretion not to compel arbitration of claims subject to arbitration). Thus, even if this court had determined that Koveleskie's Title VII claims were precluded from arbitration, her other claims still would be subject to securities industry arbitration.

III. CONCLUSION

We hold that the district court erred in denying the defendant's motion to compel arbitration of Koveleskie's discrimination claims. We find controlling the Supreme Court's reasoning and decision in Gilmer. For all the reasons stated herein, the order of the district court is **REVERSED** and this case is **REMANDED** for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

[Filed March 18, 1998]

No. 97-C-2203

MARY KOVELESKIE
Plaintiff,

v.

SBC CAPITAL MARKETS, INC.
a/k/a SBC WARBURG, INC.,
Defendant.

ORDER

Defendant's motion to dismiss is denied. Under recent authority, the discovery sought by plaintiff is appropriate before a decision can be reached on the arbitration issue. *See Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997); *Rosenberg v Merrill Lynch, Pierce, Fenner & Smtih, Inc.*, No. 96-12267-NG (D. Mass. Jan. 26, 1998)

ENTER ORDER:

/s/_____
Elaine E. Bucklo
United States District Judge

Dated: March 18, 1998

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed April 8, 1999]

No. 98-1459

HOOTERS OF AMERICA, INCORPORATED,
a Georgia corporation,
Plaintiff-Appellant,

v.

ANNETTE R. PHILLIPS,
an individual resident of South Carolina,
Third Party Plaintiff-Appellee,

v.

HOOTERS OF MYRTLE BEACH,
Incorporated, Georgia corporation,
Third Party Defendant-Appellant.

National Restaurant Association; Society of
Professionals in Dispute Resolution;
Nation Academy of Arbitrators;
Equal Employment Opportunity Commission
Amici Curiae.

OPINION

Argued Jan. 28, 1999.
Decided April 8, 1999.

Appeal from the United States District Court for the District of South Carolina, at Florence. Cameron McGowan Currie, District Judge. (CA-96-3360-4- 22)

Before WILKINSON, Chief Judge, TRAXLER, Circuit Judge, and GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

OPINION

WILKINSON, Chief Judge:

Annette R. Phillips alleges that she was sexually harassed while working at a Hooters restaurant. After quitting her job, Phillips threatened to sue Hooters in court. Alleging that Phillips agreed to arbitrate employment-related disputes, Hooters preemptively filed suit to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 4. Because Hooters set up a dispute resolution process utterly lacking in the rudiments of even-handedness, we hold that Hooters breached its agreement to arbitrate. Thus, we affirm the district court's refusal to compel arbitration.

I.

Appellee Annette R. Phillips worked as a bartender at a Hooters restaurant in Myrtle Beach, South Carolina. She

was employed since 1989 by appellant Hooters of Myrtle Beach (HOMB), a franchisee of appellant Hooters of America (collectively Hooters).

Phillips alleges that in June 1996, Gerald Brooks, a Hooters official and the brother of HOMB's principal owner, sexually harassed her by grabbing and slapping her buttocks. After appealing to her manager for help and being told to "let it go," she quit her job. Phillips then contacted Hooters through an attorney claiming that the attack and the restaurant's failure to address it violated her Title VII rights. Hooters responded that she was required to submit her claims to arbitration according to a binding agreement to arbitrate between the parties.

This agreement arose in 1994 during the implementation of Hooters' alternative dispute resolution program. As part of that program, the company conditioned eligibility for raises, transfers, and promotions upon an employee signing an "Agreement to arbitrate employment-related disputes." The agreement provides that Hooters and the employee each agree to arbitrate all disputes arising out of employment, including "any claim of discrimination, sexual harassment, retaliation, or wrongful discharge, whether arising under federal or state law." The agreement further states that

> the employee and the company agree to resolve any claims pursuant to the company's rules and procedures for alternative resolution of employment-related disputes, as promulgated by the company from time to time ("the rules"). Company will make available or

provide a copy of the rules upon written request of the employee.

The employees of HOMB were initially given a copy of this agreement at an all- staff meeting held on November 20, 1994. HOMB's general manager, Gene Fulcher, told the employees to review the agreement for five days and that they would then be asked to accept or reject the agreement. No employee, however, was given a copy of Hooters' arbitration rules and procedures. Phillips signed the agreement on November 25, 1994. When her personnel file was updated in April 1995, Phillips again signed the agreement.

After Phillips quit her job in June 1996, Hooters sent to her attorney a copy of the Hooters rules then in effect. Phillips refused to arbitrate the dispute.

Hooters filed suit in November 1996 to compel arbitration under 9 U.S.C. § 4. Phillips defended on the grounds that the agreement to arbitrate was unenforceable. Phillips also asserted individual and class counterclaims against Hooters for violations of Title VII and for a declaration that the arbitration agreements were unenforceable against the class. In response, Hooters requested that the district court stay the proceedings on the counterclaims until after arbitration, 9 U.S.C. § 3.

In March 1998, the district court denied Hooters' motions to compel arbitration and stay proceedings on the counterclaims. The court found that there was no meeting of the minds on all of the material terms of the agreement and even if there were, Hooters' promise to arbitrate was illusory. In addition, the court found that the arbitration agreement was

unconscionable and void for reasons of public policy. Hooters filed this interlocutory appeal, 9 U.S.C. § 16.

II.

The benefits of arbitration are widely recognized. Parties agree to arbitrate to secure "streamlined proceedings and expeditious results [that] will best serve their needs." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). The arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve. Amicus Brief for Society of Professionals in Dispute Resolution at 2- 3 (citing Baxter, Arbitration or Litigation for Employment Civil Rights?, 2 Individual Employment Rights 19 (1993 94); Maltby, The Projected Impact of the Model Employment Termination Act, Annals of the Am. Acad. of Pol. and Soc. Sci. (Nov. 1994)). Further, the adversarial nature of litigation diminishes the possibility that the parties will be able to salvage their relationship. For these reasons parties agree to arbitrate and trade "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (internal quotation marks omitted).

In support of arbitration, Congress passed the Federal Arbitration Act (FAA), ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 1 et seq.). "Its purpose was to reverse the longstanding judicial hostility to arbitration

agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." Gilmer, 500 U.S. at 24. The FAA manifests "a liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). When a valid agreement to arbitrate exists between the parties and covers the matter in dispute, the FAA commands the federal courts to stay any ongoing judicial proceedings, 9 U.S.C. § 3, and to compel arbitration, id. § 4.

The threshold question is whether claims such as Phillips' are even arbitrable. The EEOC as amicus curiae contends that employees cannot agree to arbitrate Title VII claims in predispute agreements. We disagree. The Supreme Court has made it plain that judicial protection of arbitral agreements extends to agreements to arbitrate statutory discrimination claims. In Gilmer v. Interstate/Johnson Lane Corp., the Court noted that " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' " 500 U.S. at 26 (alteration in original) (quoting Mitsubishi Motors, 473 U.S. at 628). Thus, a party must be held to the terms of its bargain unless Congress intends to preclude waiver of a judicial forum for the statutory claims at issue. Such an intent, however, must "be discoverable in the text of the [substantive statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." Id.

The EEOC argues that in passing the Civil Rights Act of 1991, Pub. L. No. 102- 166, 105 Stat. 1071, Congress

evinced an intent to prohibit predispute agreements to arbitrate claims arising under Title VII. This circuit, however, has already rejected this argument. Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 881-82 (4thCir.1996). The Civil Rights Act of 1991 provided that "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under [Title VII]." Pub. L. No. 102- 166, § 118, 105 Stat. at 1081. In Austin, we stated that this language "could not be any more clear in showing Congressional favor towards arbitration." 78 F.3d at 881. We also noted that the legislative history did not establish a contrary intent nor was there an "inherent conflict" between the Civil Rights Act and arbitration. Id. at 881-82. This holding is in step with our sister circuits which have also rejected the EEOC's argument. See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc., 1999 WL 80964, at *5-*9 (1st Cir. Feb.24,1999); Seus v. John Nuveen & Co., 146 F.3d 175, 182-83 (3d Cir.1998), cert. denied, --- U.S. ----, 119 S.Ct. 1028, --- L.Ed.2d ---- (1999); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir.1997). But see Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1189-1200 (9th Cir.), cert. denied, --- U.S. ----, 119 S.Ct. 465, --- L.Ed.2d ---- (1998).

III.

Predispute agreements to arbitrate Title VII claims are thus valid and enforceable. The question remains whether a binding arbitration agreement between Phillips and Hooters exists and compels Phillips to submit her Title VII claims to arbitration. The FAA provides that agreements "to settle by arbitration a controversy thereafter arising out of such

contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "It [i]s for the court, not the arbitrator, to decide in the first instance whether the dispute [i]s to be resolved through arbitration." AT & T Techs., Inc. v. Communication Workers of Am., 475 U.S. 643, 651, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986); see also A.T. Massey Coal Co. v. International Union, 799 F.2d 142, 146 (4th Cir.1986) ("[W]hether there is a contract to arbitrate 'is undeniably an issue for judicial determination.' " (quoting AT & T Techs., 475 U.S. at 649)). In so deciding, we " 'engage in a limited review to ensure that the dispute is arbitrable--i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement.' " Glass v. Kidder Peabody & Co., 114 F.3d 446, 453 (4th Cir.1997) (quoting Paine Webber Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir.1990)).

Hooters argues that Phillips gave her assent to a bilateral agreement to arbitrate. That contract provided for the resolution by arbitration of all employment-related disputes, including claims arising under Title VII. Hooters claims the agreement to arbitrate is valid because Phillips twice signed it voluntarily. Thus, it argues the courts are bound to enforce it and compel arbitration.

We disagree. The judicial inquiry, while highly circumscribed, is not focused solely on an examination for contractual formation defects such as lack of mutual assent and want of consideration. Virginia Carolina Tools, Inc. v. International Tool Supply, Inc., 984 F.2d 113, 118-19 (4th Cir.1993) (holding that continued existence of arbitration

agreement is matter for judicial determination). Courts also can investigate the existence of "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. However, the grounds for revocation must relate specifically to the arbitration clause and not just to the contract as a whole. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-04, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); see also Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir.1979). In this case, the challenge goes to the validity of the arbitration agreement itself. Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith.

Hooters and Phillips agreed to settle any disputes between them not in a judicial forum, but in another neutral forum--arbitration. Their agreement provided that Hooters was responsible for setting up such a forum by promulgating arbitration rules and procedures. To this end, Hooters instituted a set of rules in July 1996. [FN1]

The Hooters rules when taken as a whole, however, are so one-sided that their only possible purpose is to undermine the neutrality of the proceeding. The rules require the employee to provide the company notice of her claim at the outset, including "the nature of the Claim" and "the specific act(s) or omissions(s) which are the basis of the Claim." Rule 6-2(1), (2). Hooters, on the other hand, is not required to file any responsive pleadings or to notice its defenses. Additionally, at the time of filing this notice, the employee must provide the company with a list of all fact witnesses with a brief summary of the facts known to each.

Rule 6-2(5). The company, however, is not required to reciprocate.

The Hooters rules also provide a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decisionmaker. Rule 8. The employee and Hooters each select an arbitrator, and the two arbitrators in turn select a third. Good enough, except that the employee's arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters. This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision maker would be a surprising result.

Nor is fairness to be found once the proceedings are begun. Although Hooters may expand the scope of arbitration to any matter, "whether related or not to the Employee's Claim," the employee cannot raise "any matter not included in the Notice of Claim." Rules 4-2, 8-9. Similarly, Hooters is permitted to move for summary dismissal of employee claims before a hearing is held whereas the employee is not permitted to seek summary judgment. Rule 14-4. Hooters, but not the employee, may record the arbitration hearing "by audio or videotaping or by verbatim transcription." Rule 18-1. The rules also grant Hooters the right to bring suit in court to

vacate or modify an arbitral award when it can show, by a preponderance of the evidence, that the panel exceeded its authority. Rule 21-4. No such right is granted to the employee.

In addition, the rules provide that upon 30 days notice Hooters, but not the employee, may cancel the agreement to arbitrate. Rule 23-1. Moreover, Hooters reserves the right to modify the rules, "in whole or in part," whenever it wishes and "without notice" to the employee. Rule 24-1. Nothing in the rules even prohibits Hooters from changing the rules in the middle of an arbitration proceeding.

If by odd chance the unfairness of these rules were not apparent on their face, leading arbitration experts have decried their one-sidedness. George Friedman, senior vice president of the American Arbitration Association (AAA), testified that the system established by the Hooters rules so deviated from minimum due process standards that the Association would refuse to arbitrate under those rules. George Nicolau, former president of both the National Academy of Arbitrators and the International Society of Professionals in Dispute Resolution, attested that the Hooters rules "are inconsistent with the concept of fair and impartial arbitration." He also testified that he was "certain that reputable designating agencies, such as the AAA and Jams/Endispute, would refuse to administer a program so unfair and one-sided as this one." Additionally, Dennis Nolan, professor of labor law at the University of South Carolina, declared that the Hooters rules "do not satisfy the minimum requirements of a fair arbitration system." He found that the "most serious flaw" was that the "mechanism [for selecting arbitrators] violates the most fundamental aspect of

justice, namely an impartial decision maker." Finally, Lewis Maltby, member of the Board of Directors of the AAA, testified that "This is without a doubt the most unfair arbitration program I have ever encountered."

In a similar vein, two major arbitration associations have filed amicus briefs with this court. The National Academy of Arbitrators stated that the Hooters rules "violate fundamental concepts of fairness ... and the integrity of the arbitration process." Likewise, the Society of Professionals in Dispute Resolution noted that "[i]t would be hard to imagine a more unfair method of selecting a panel of arbitrators." It characterized the Hooters arbitration system as "deficient to the point of illegitimacy" and "so one sided, it is hard to believe that it was even intended to be fair."

We hold that the promulgation of so many biased rules--especially the scheme whereby one party to the proceeding so controls the arbitral panel--breaches the contract entered into by the parties. The parties agreed to submit their claims to arbitration--a system whereby disputes are fairly resolved by an impartial third party. Hooters by contract took on the obligation of establishing such a system. By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.

Moreover, Hooters had a duty to perform its obligations in good faith. See Restatement (Second) of Contracts § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); Virginia Vermiculite, Ltd. v. W.R. Grace & Co., 156 F.3d 535, 542 (4th Cir.1998) (" 'The

courts could leave all discretion in performance unbridled.... No U.S. court now takes this approach.... Thus, contractual discretion is presumptively bridled by the law of contracts--by the covenant of good faith implied in every contract.' ") (quoting Steven J. Burton & Eric G. Anderson, Contractual Good Faith 46-47 (1995)). Good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement (Second) of Contracts § 205 cmt. a. Bad faith includes the "evasion of the spirit of the bargain" and an "abuse of a power to specify terms." Id. § 205 cmt. d. By agreeing to settle disputes in arbitration, Phillips agreed to the prompt and economical resolution of her claims. She could legitimately expect that arbitration would not entail procedures so wholly one-sided as to present a stacked deck. Thus we conclude that the Hooters rules also violate the contractual obligation of good faith.

Given Hooters' breaches of the arbitration agreement and Phillips' desire not to be bound by it, we hold that rescission is the proper remedy. Generally, "rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties." Rogers v. Salisbury Brick Corp., 299 S.C. 141, 382 S.E.2d 915, 917 (1989); see also Hogue v. Pellerin Laundry Mach. Sales Co., 353 F.2d 772, 774 (8th Cir.1965) (noting rescission is permitted " 'for any breach of contract of so material and substantial a nature as would constitute a defense to an action brought by the party in default for a refusal to proceed with the contract.' " (quoting Williston on Contracts § 1467 (rev. ed.))). As we have explained, Hooters' breach is by no means insubstantial; its performance under the contract was so egregious that the

result was hardly recognizable as arbitration at all. We therefore permit Phillips to cancel the agreement and thus Hooters' suit to compel arbitration must fail. [FN2]

IV.

We respect fully the Supreme Court's pronouncement that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." Moses H. Cone, 460 U.S. at 24. Our decision should not be misread: We are not holding that the agreement before us is unenforceable because the arbitral proceedings are too abbreviated. An arbitral forum need not replicate the judicial forum. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." Mitsubishi Motors, 473 U.S. at 626-27; see also Gilmer, 500 U.S. at 31-32 (rejecting abbreviated discovery and lack of written opinions as reasons to inhibit arbitration of statutory claims).

Nor should our decision be misunderstood as permitting a full-scale assault on the fairness of proceedings before the matter is submitted to arbitration. Generally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance. Only after arbitration may a party then raise such challenges if they meet the narrow grounds set out in 9 U.S.C. § 10 for vacating an arbitral award. In the case before us, we only reach the content of the arbitration rules because their promulgation was the duty of one party under the contract. The material breach of this duty warranting rescission is an issue of substantive arbitrability and thus is reviewable before arbitration. See Glass, 114 F.3d

at 453-56. This case, however, is the exception that proves the rule: fairness objections should generally be made to the arbitrator, subject only to limited post-arbitration judicial review as set forth in section 10 of the FAA.

By promulgating this system of warped rules, Hooters so skewed the process in its favor that Phillips has been denied arbitration in any meaningful sense of the word. To uphold the promulgation of this aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution. This we refuse to do.

The judgment of the district court is affirmed, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED

FN1. The 1996 rules superseded a set of rules drafted in 1994 and would govern any arbitration of Phillips' claims. Because we deal with Hooters' performance under the agreement and not contract formation issues, we focus exclusively on the details of the 1996 rules.

FN2. Phillips asserts that the Hooters rules also attempt to effect a waiver of substantive statutory rights by limiting the remedies that an arbitration panel may award. She further argues that employees cannot waive substantive statutory rights in predispute arbitration agreements, or at the very least, such waivers must be knowing and voluntary. Because we

hold that no valid agreement to arbitrate exists in this case, we need not take up these questions.

APPENDIX D

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 21. CIVIL RIGHTS

GENERALLY

42 USCS § 1981a (1999)

@ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery.

(1) Civil rights. In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 *(42 U.S.C. § 2000e-5* [or 2000e-16]) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act *(42 U.S.C. § 2000e-2* or 2000e-3 [or 2000e-16), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes *(42 U.S.C. § 1981),* the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [*42 USCS § 2000e-5*(g)], from the respondent.

(2) Disability. In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [*42 USCS*

§ *2000e-5*(g)] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 *(42 U.S.C.* § *12117*(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 *(29 U.S.C.* § *794a*(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 *(29 U.S.C.* § *791)* and the regulations implementing section 501 [*29 USCS* § *791],* or who violated the requirements of section 501 of the Act [*29 USCS* § *791]* or the regulations implementing section 501 [*29 USCS* § *791]* concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 *(42 U.S.C.* § *12112),* or committed a violation of section 102(b)(5) of the Act [*42 USCS* § *12112*(b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [*42 USCS* § *2000e-5*(g)], from the respondent.

(3) Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [*42 USCS* § *12112*(b)(5)] or regulations implementing section 501 of the Rehabilitation Act of 1973 [*29 USCS* § *791],* damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages.

(1) Determination of punitive damages. A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages. Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [*42 USCS § 2000e-5*(g)].

(3) Limitations. The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 300,000.

(4) Construction. Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes *(42 U.S.C. § 1981).*

(c) Jury trial. If a complaining party seeks compensatory or punitive damages under this section--

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

(d) Definitions. As used in this section:

(1) Complaining party. The term "complaining party" means--

(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 *(42 U.S.C. § § 2000e* et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 505(a)(1) of the Rehabilitation Act of 1973 *(29 U.S.C. § 794a*(a)(1)), or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 *(42 U.S.C. § § 12101* et seq.).

(2) Discriminatory practice. The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).

HISTORY: (R. S. 1977A, as added Nov. 21, 1991, P.L. 102-166, Title I, § 102, 105 Stat. 1072.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

the bracketed matter "or 2000e-16" was inserted in two places in subsec. (a)(1) in order to conform to the probable intent of Congress.

Effective date of section:

Act Nov. 21, 1991, P.L. 102-166, Title IV, § 402(a), 105 Stat. 1099, which appears as *42 USCS § 1981* note, provides that this section is effective on enactment.

Application of section. Act Nov. 21, 1991, P.L. 102-166, Title IV, § 402(b), 105 Stat. 1099, which appears as *42*

USCS § 1981 note, provides that nothing in such Act (adding this section, among other things) shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after Oct. 30, 1983.

Alternative means of dispute resolution. Nov. 21, 1991, P.L. 102-166, Title I, § 118, 105 Stat. 1081 (effective on enactment and applicable as provided by § 402 of such Act, which appears as a note to this section), provides: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title [for full classification, consult USCS Tables volumes]."

Supreme Court, U.S.
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No. 98-1778

IN THE

Supreme Court of the United States

MARY KOVELESKIE,

Petitioner,

v.

SBC CAPITAL MARKETS, INC.
a/k/a SBC WARBURG, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. The transaction costs attending litigation in federal court may not be identical to the costs attending arbitration under securities industry arbitration procedures. Is a hypothetical risk that arbitration of Title VII claims will involve non-identical costs a ground to hold an arbitration agreement invalid?

2. The Court has repeatedly held that before arbitration occurs it is premature to complain that the arbitrators may misapply the law. Is a hypothetical risk that arbitrators may misapply the law regarding Title VII a ground to hold an arbitration agreement invalid?

3. Did the 1991 Civil Rights Act overrule *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and exempt civil rights laws, including Title VII and ADEA, from the Federal Arbitration Act?

LIST OF PARTIES AND CORPORATE AFFILIATES

The caption of the petition for writ of certiorari names "SBC Capital Markets, Inc. a/k/a SBC Warburg, Inc." as the Respondent. The proper name of the Respondent is Warburg Dillon Read LLC.

The Respondent has three equity owners: UBS AG (52.75%), UBS (USA) Inc. (47%), and UBS Inc. (0.25%). UBS (USA) Inc. is a Delaware corporation owned by UBS AG (95%) and UBS Inc. (5%). UBS Inc. is a New York corporation wholly owned by UBS AG.

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OPINIONS BELOW

The District Court's March 18, 1998 order, which denied the Respondent's motion to compel arbitration, was a minute order. Appendix B to the petition reprints only the reverse side of the minute order. The face of the minute order states:

> Defendant's motion to dismiss (4-2) and its motion to compel arbitration (4-1) are denied. Under recent authority, the discovery sought by plaintiff is appropriate before a decision can be reached on the issue of arbitration. Status hearing set for 4/17/98 at 9:45 a.m.

R. 31.[1]

STATEMENT OF THE CASE

The Petitioner's Title VII claims are facially subject to arbitration because she signed an agreement to arbitrate all employment claims, identical to the agreement held enforceable in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).[2] In that agreement, the Petitioner agreed to arbitrate all claims between herself and her employer, including employment-related claims, at the instance of either party. Now she urges three reasons why she should be relieved of her agreement:

> (1) The possibility that in arbitration a claimant might incur certain fees that have no exact

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1. Citations to the Pleading Volume of the Record on Appeal are in the form "R. __." The Exhibits Volume of the Record on Appeal actually contains a single plaintiff's brief (R. 11), with attached exhibits. Citations to the Appendix to the Petition are in the form "A. __."

2. In addition to claims under Title VII, the Petitioner also asserted below claims under the Equal Pay Act and the New York Human Rights Law. The Seventh Circuit held that all of these claims are subject to arbitration under the Petitioner's arbitration agreement. A. 2a, 18a. The Petitioner challenges that ruling only as it relates to her Title VII claims, conceding that her other claims are arbitrable.

counterpart in litigation assertedly may chill unemployed and impoverished claimants from asserting Title VII claims.

(2) Though no arbitration has occurred, the Petitioner fears that arbitrators may misapply the law.

(3) The 1991 Civil Rights Act, enacted six months after *Gilmer* and providing that arbitration of Title VII and other civil rights claims is "encouraged . . . where appropriate and to the extent authorized by law," purportedly codifies a pre-*Gilmer* hostility to arbitration.

The issues urged by the Petitioner are not only fraught with problems of standing and prematurity, but are otherwise unworthy of review. The Federal Arbitration Act ("FAA") mandates enforcement of agreements to arbitrate statutory disputes unless: (1) there are contract formation defects under state law; or (2) Congress plainly overrode the FAA in the statute at issue. The purported "forum fees" and "might not follow the law" issues asserted here are not contract formation defects, nor is there any credible reason to believe Congress intended to exempt Title VII from the FAA on these (or any other) bases. Nor, contrary to the Petitioner's assertions, is there a circuit split on whether agreements to arbitrate Title VII claims are unenforceable on these bases.

A. The Petitioner's Arbitration Agreement.

The Petitioner held a variety of employment positions with the Respondent, the last of which was as a securities trader. To protect customers, the SEC requires securities traders to register with the exchanges on which they trade.[3] In February 1995 the Petitioner therefore registered with five exchanges: the New

3. 17 C.F.R. § 240.1567-1; *see* SEC Release No. 34-32261, 58 Fed. Reg. 27656.

York Stock Exchange ("NYSE"), the National Association of Securities Dealers ("NASD"), the Chicago Board Options Exchange ("CBOE"), the Philadelphia Stock Exchange ("PHLX"), and the Pacific Stock Exchange ("PSE"). R. 5, Ex. A.

There is a standard form for registering with any exchange, called "Form U-4: Uniform Application for Securities Industry Registration or Transfer." Form U-4 (the same agreement that the Court construed in *Gilmer*, 500 U.S. at 23) is a contract between the registering trader and each designated exchange. *Id.* at 25 n.2. The Form U-4 contract includes, under the heading "THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY," an agreement by the applicant to follow any arbitration rules adopted by the designated exchanges for resolving disputes between the applicant and his or her employer. R. 5, Ex. A at 4. Not every exchange has such rules,[4] but at the time the dispute in this case arose, all five of the exchanges with which the Petitioner registered had rules requiring arbitration of disputes between the registrant and his or her employer, if either party requested it.[5]

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4. As the Seventh Circuit noted below, A. 16a n.2, the American Stock Exchange does not. *See* American Stock Exchange Rule 600(a) (American Stock Exchange Guide (CCH) ¶ 9540, at 2811 (1996)) (AMEX rules require arbitration of some disputes, but not disputes between associated members (i.e., traders) and their firms).

5. *See* NYSE Rule 347 (NYSE Guide (CCH) ¶ 2347 (1995)); NASD Rule 10101, 10201 (NASD Manual (CCH) at 7511 (1996)); CBOE Rule 18.1 (CBOE Constitution & Rules (CCH) ¶ 2511) (1995)); PHLX Bylaws § 10-8 (Philadelphia Stock Exchange Guide (CCH) ¶ 1232 (1996)); PSE Rule 12 (Pacific Stock Exchange Guide (CCH) ¶ 6435 (1993)).

The NASD and NYSE have now changed their rules to remove the requirement that statutory claims of employment discrimination must be arbitrated at the request of either party, though other employment claims remain subject to arbitration, and the exchanges

(Cont'd)

The Petitioner has admitted that she executed her Form U-4 agreement (R. 3, ¶ 22), though, like the plaintiff in *Gilmer*, she complains that it was "a condition of her employment." *Id.* But she does not dispute that the Court held Gilmer's Form U-4 agreement enforceable even though it was "required by his employment." 500 U.S. at 23. The Petitioner also contends that the "language of the arbitration agreement was non-negotiable." Petition at 4. But she does not dispute the Seventh Circuit's observation that arbitration occurs under the agreement's terms only if the employer or the employee requests it,[6] and whether

(Cont'd)

still provide an arbitration forum for those who wish to arbitrate statutory discrimination claims. The NASD Rules (Rule 10201) were amended effective January 1, 1999. *See* SEC Rel. No. 34-40109, 63 Fed. Reg. 35299, 1998 WL 339422. The NASD rule change is not retroactive. *See* NASD Regulation answers to frequently asked questions, <http://www.nasdr.com/2805.html>. The NYSE proposed rule change (SEC Rel. No. 34-40479, 63 Fed. Reg. 52782, 1998 WL 670164) was approved by the SEC on December 29, 1998 (SEC Rel. No. 34-40858, 64 Fed. Reg. 1051, 1999 WL 3315), and is silent on retroactivity. *See Koveleskie*, A. 3a n.1. On October 1, 1998, the SEC granted accelerated approval of the PHLX's proposal to discontinue its independent arbitration program. PHLX now refers member firms and registrants to the NASD arbitration forum. SEC Rel. No. 34-40517, 1998 WL 681447. On February 22, 1999, the CBOE amended its rules, effective that date, to provide that claims involving discrimination, including sexual harassment, are "not appropriate for arbitration at the Exchange." SEC Rel. No. 34-41080, 1999 WL 89027. On February 3, 1999, the PSE proposed an amendment to its arbitration rules to mirror the NASD's and NYSE's rule changes for arbitration of statutory employment claims. The SEC approved the PSE's proposed rule change on April 30, 1999. SEC Rel. No. 34-41350, 1999 WL 261839.

6. Contrary to the Petitioner's assertion that the Form U-4 requires arbitration "at the employer's option," Petition at 4, *either* side may request arbitration, and sometimes it is the employee who does so. *See, e.g., Glennon v. Dean Witter Reynolds*, 83 F.3d 132, 134 (6th Cir. 1996) (employee demanded arbitration of employment-related dispute; court affirmed arbitration award for employee, including $750,000 in punitive damages).

the parties choose to request it is fully negotiable. A. 16a & n.4. Indeed, the Petitioner's counsel have negotiated agreements with two large brokerage firms (Merrill Lynch and Smith Barney) not to request arbitration of employment discrimination claims, and have publicized those negotiated agreements by posting web sites. *See* <http://www.classactionmerrill.com>; <http://www.classactionsb.com>.

B. The Petitioner's Complaint and Proceedings Below.

The Petitioner was employed by Respondent until April 1996, when she walked off the job, claiming "constructive discharge" because of alleged denial of equal pay and opportunities and alleged inappropriate comments. R. 3, ¶¶ 4-15.[7] She filed an EEOC charge, file-stamped by the EEOC on July 2, 1996, R. 1, Ex. A, but before the EEOC made a determination she requested a right-to-sue letter. She filed her initial complaint on March 31, 1997. R. 1. The Respondent promptly moved to compel arbitration in accordance with the Petitioner's Form U-4 arbitration agreement and the exchanges' rules. R. 4, 5. In response, the Petitioner filed an amended complaint, R. 3, challenging the enforceability of her arbitration agreement on numerous grounds, most of which are not raised in this Court. The Respondent renewed its motion to compel arbitration, R. 7, 8, and the motion was fully briefed by May 29, 1997. R. 13.

The District Court held two brief status hearings in August 1997 (8-7-97 Tr.; 8-12-97 Tr.), but did not entertain argument on the motion. On March 18, 1998 the District Court denied the motion to compel arbitration in a brief minute order. R. 31.

The Respondent appealed the denial, and on February 4, 1999 the Seventh Circuit reversed, rejecting each of the

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7. Many of the alleged incidents are alleged to have occurred as early as 1986, far outside the 300 day period preceding the filing of the Petitioner's EEOC charge. Such claims are untimely. *See Skouby v. Prudential Ins.*, 130 F.3d 794, 796, 797 (7th Cir. 1997).

Petitioner's arguments why she should be excused from her agreement to arbitrate. A. 1a.

C. The Record.

The Petitioner asserts that she sought to take discovery and that the record contains "undisputed record evidence." Petition at 5. In fact, the Petitioner never propounded any discovery at all, and the District Court held no hearings so as to create any evidentiary record.

In her response to the Respondent's renewed motion to compel arbitration, R. 11, the Petitioner attached a variety of documents, which she now calls the "undisputed record evidence." Those attachments are not, of course, necessary or dispositive of such matters as the rules of the exchanges, which are published and readily available.

The Petitioner also refers to another attachment, a collection of 33 photocopies of NYSE arbitration awards, R. 11 at Ex. J, from which she invites conclusions about the imposition of fees in arbitration. The same collection of 33 awards (selected and assembled by undisclosed means) has been presented to other courts, including the First Circuit, which observed that "it does not appear to be the usual situation that a plaintiff is asked to bear forum fees. . . . [I]n the thirty-three arbitration cases . . . only one plaintiff who prevailed on statutory grounds was denied fees and costs." *Rosenberg v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 170 F.3d 1, 15-16 (1st Cir. 1999). Nor are securities industry arbitrations limited to these 33 cases. NASD and NYSE arbitration decisions are published by Westlaw in the FSEC-ARB database, and those published results reinforce the First Circuit's conclusion.

The Petitioner also refers to R. 11, Ex. I, a photocopy of an Arbitrator's Manual (misidentified as dated 1996; Ex. I is actually dated 1992), "compiled by members of the Securities Industry Conference on Arbitration (SICA) as a guide for

arbitrators" (R. 11, Ex. I, Preface), as "undisputed evidence." Petition at 6. She emphasizes a single sentence in the 50-page manual, stating that arbitrators "are not strictly bound by case precedent or statutory law," but omits all context. In fact, the manual stresses on the one hand the informality of arbitration, including the familiar principle that "strict rules of evidence" need not be applied and that "generally arbitration proceedings should be more informal and should permit more liberal introduction of evidence than would be permitted in courts" (Ex. I at 22-23), and on the other hand the arbitrator's duty to follow applicable statutes on matters of liability or attorney's fees (seeking guidance from the parties through briefs and oral argument) (*id.* at 24, 28), strengthened by an admonition that an award may be vacated if the arbitrator disregards the law (*id.* at 26).

The record does contain some undisputed facts: the admissions contained in the amended complaint. Among those admissions is the Petitioner's acknowledgment that, so far from being "a worker who has lost her job and is without gainful employment" who allegedly may be chilled from asserting Title VII claims (Petition at 11; *see also id.* at 8), the Petitioner was promptly reemployed in a securities position following her resignation from the Respondent. R. 3, ¶ 71.

REASONS FOR DENYING THE WRIT

The FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court has recognized that the FAA embodies a "liberal federal policy favoring arbitration agreements" and "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Const.*, 460 U.S. 1, 24-25 (1983). This is true even when the claims to be arbitrated involve important statutory rights. *Gilmer*, 500 U.S. at 26. As the Court has repeatedly emphasized,

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). *See also Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 481 (1989); *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987).

The Court has made clear that a party may challenge the enforceability of an arbitration agreement only on limited grounds. The first is suggested by the terms of the FAA itself: contract formation defects ("such grounds as exist at law or in equity for the revocation of any contract") may prevent the formation of a valid arbitration agreement. *See Gilmer*, 500 U.S. at 33 ("the FAA's purpose was to place arbitration agreements on the same footing as other contracts," subject to contract-formation defenses such as fraud). Such challenges must be evaluated under state contract-formation law (*see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1993)), and the state law cannot single out arbitration agreements, but must be applicable to "any contract," or it is preempted by the FAA (*see Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 686-88 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

The Petitioner's complaints about arbitration — that she might incur forum fees or that the arbitrators might misapply the law — are not complaints about contract formation under state law.[8]

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8. The Petitioner does offer comments that she lacked knowledge about the workings of securities industry arbitration when she signed her Form U-4, that she "had no choice," and that the agreement was "non-negotiable." Petition at 4. She does not expressly urge these as grounds to invalidate her contract, and they are not grounds to invalidate

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The second ground on which a party may challenge the enforceability of an agreement to arbitrate statutory claims is by showing that Congress intended to exempt the statute at issue from the FAA. As the Court explained in *McMahon*:

> The Arbitration Act, standing alone, . . . mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. . . . If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," . . . or from an inherent conflict between arbitration and the statute's underlying purposes.

McMahon, 482 U.S. at 226-27, *quoting Mitsubishi*, 473 U.S. at 628. *See also Gilmer*, 500 U.S. at 26-32 (finding no inconsistency between ADEA and FAA to indicate that Congress intended to exempt ADEA from FAA).

The prime questions posed by the Petition are whether the identified issues — the risks that arbitrators will impose forum

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a contract under Illinois law. *See, e.g., Bunge Corp. v. Williams*, 45 Ill. App. 3d 359, 364-65, 359 N.E.2d 844, 847-48 (5th Dist. 1977) (upholding arbitration agreement despite plaintiff's claim he did not appreciate what he signed); *Kewanee Prod. Credit Ass'n v. G. Larsons & Sons Farms*, 146 Ill. App. 3d 301, 305, 496 N.E.2d 531, 534 (3d Dist. 1986) (cited by Seventh Circuit, A. 12a-13a, for the proposition that "Illinois law does not void contracts when the parties have unequal bargaining power, even if the proposed contract is a so-called 'take-it-or-leave-it' deal and 'consent to [the] agreement is secured because of hard bargaining positions or the pressure of financial circumstances' ").

fees or misapply the law — demonstrate congressional intent to exempt Title VII from the FAA. These questions do not merit review. Nor does the final question — whether the 1991 Civil Rights Act's provision that arbitration is "encouraged . . . where appropriate and to the extent authorized by law" actually shows a congressional intent to bar arbitration — merit review.

I.

THE "FORUM FEES" ISSUE DOES NOT MERIT REVIEW.

The Petitioner asserts that a claimant in securities arbitration may incur expenses — filing and forum fees — that have no direct counterpart in federal court litigation, and that the risk such fees will be imposed may chill unemployed claimants of straitened means from asserting Title VII claims. Review of this claim should be denied because: (1) the Petitioner lacks standing to assert it; (2) the issue is not an unsettled one of great importance; and (3) the asserted circuit split does not exist.

A. The Petitioner Lacks Standing.

The Petitioner asserts that "the possibility that expensive fees may be assessed against a worker who has lost her job and is without gainful employment will chill her willingness to arbitrate her discrimination claims." Petition at 11. Even if this "possibility" were real,[9] the Petitioner lacks standing to

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9. In fact, fees may be waived in case of hardship and arbitrators retain discretion how to allocate fees between the parties. *See* SEC Rel. 34-41056, 64 Fed. Reg. 10041, 10048 & n.95 (March 1, 1999):

> NASD Regulation has stated it will waive the initial filing fee and hearing session deposit at the time of filing if a party can demonstrate financial hardship. Arbitrators also may order a respondent to reimburse a claimant for the amount of the filing fee paid at the beginning of the case.

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challenge the chill experienced by the unemployed, for she is employed. R. 3, ¶ 71.

A party "has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972). When a plaintiff herself is "not chilled, but seek[s] only to represent those 'millions' who[m] [she] believe[s] are so chilled, [she] clearly lack[s] that 'personal stake in the outcome of the controversy essential to standing.' " *Tatum v. Laird*, 408 U.S. 1, 14 n.7 (1972), *quoting Baker v. Carr*, 369 U.S. 186, 204 (1962).

B. There is No Unsettled Issue of Great Importance.

Apart from the question of chill, the Petitioner suggests that it would violate the substantive statute (Title VII) to enforce an agreement to arbitrate, when the arbitral forum may involve expenses without counterpart in litigation. The Court rejected precisely such an argument in *Vimar Seguros y Reaseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). The petitioner there had entered an agreement to arbitrate disputes about a shipment of goods from Morocco to Boston before a panel of Japanese arbitrators in Tokyo, but sought instead to litigate a dispute in federal court in Boston. The petitioner argued that the "inconvenience and costs of proceeding in Japan" would undermine the substantive protections of the governing statute (the Carriage of Goods by Sea Act ("COGSA")), and that

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See, e.g., In re Arbitration between Owen-Williams and Merrill Lynch, 1997 WL 34966 (NASD, Nov. 12, 1997), at *2 (waiving fees because of hardship). *See also* SEC Rel. No. 34-41056, 64 Fed. Reg. at 10048, 10050 ("fees are not automatically imposed on either party . . . . [A]rbitrators make fee allocations after a hearing on the record"); *id.* at 10050 ("it is the arbitrators who decide who will pay [fees] in any individual case"); NASD Rules 10205, 10332; NYSE Rule 629. Published arbitration decisions suggest that employers usually bear all or a substantial portion of forum fees even when they prevail.

COGSA therefore took priority over the FAA. *Id.* at 532. The Court rejected this argument, holding that there is a difference "between explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated," and any "inconvenience and costs" associated with the arbitral forum were no reason to invalidate the agreement to arbitrate. *Id.* at 534.

The Court reached a similar conclusion in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). *Shute* held a pre-printed form agreement with a forum-selection clause enforceable, despite the inconvenience and expense of the forum (Florida) to the plaintiff (a resident of Washington State). The Court rejected the plaintiff's argument that "unreasonable hardship in asserting [substantive statutory] rights" would undermine the substantive protections of the governing statute (the Limitation of Vessel Owners' Liability Act). *Id.* at 596.

The issue asserted here — whether the transaction cost of resolving a statutory claim in an alternative forum compromises substantive statutory rights, so as to support an inference that the alternative forum is irreconcilable with the statute — is not an unsettled issue of great importance, for the Court has already resolved it in *Vimar Seguros* and *Shute*.

Indeed, the Petitioner's assumption that arbitration is more expensive than litigation is hardly established. Though arbitral forum fees (if they are imposed on a claimant at all) may have no precise litigation counterpart, they are only one component of the possible expenses of arbitration versus litigation.[10] The Court has recognized that arbitration and litigation procedures are not identical, and that there are trade-offs of advantages

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10. *See* SEC Rel. No. 34-41056, 64 Fed. Reg. at 10050 n.107 ("Litigation is likely to involve other significant costs associated with depositions and attorney fees that would likely be lower in an arbitration setting.").

between the two. *Gilmer*, 500 U.S. at 31. The aim of arbitration is to seek "streamlined proceedings and expeditious results" in order "to keep the effort and expense required to resolve a dispute within manageable bounds." *Mitsubishi*, 473 U.S. at 633. Arbitration "is usually cheaper and faster than litigation." *Allied-Bruce Terminix*, 573 U.S. at 280. *See also Rosenberg*, 170 F.3d at 16 ("arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court").[11]

Apart from the speed of proceedings, litigation may involve expenses not found in arbitration. In court, a losing plaintiff's liability for the other side's costs under Fed. R. Civ. P. 54(d) (including, e.g., filing fees, deposition transcript costs, witness fees, copying charges; *see* 28 U.S.C. § 1920) is virtually automatic, and may be substantial.[12] The published NYSE and

11. Even if the forum fees are viewed in isolation, the Petitioner's asserted contrast between a litigation forum subsidized by taxpayers and an unsubsidized arbitral forum is a false one. The entire cost of securities industry arbitration is not imposed on the litigants. *See* SEC Rel. 34-41056, 64 Fed. Reg. at 10047 ("[T]he filing fees and hearing session deposits . . . do not cover the cost of administering the [NASD arbitration] program"); *id.* at 10047 n.89 ("filing and hearing session fees" pay for approximately 50-68% of the direct costs for administering individual cases); *id.* at 10047 n.89, 10048 n.97 (filing fee and hearing session fees do not cover "NASD Regulation's general costs for administering the arbitration department, including costs for arbitrator recruitment and training, computer systems, office space, senior management, and legal services;" member surcharges pay for NASD Regulation's general costs for arbitration administration and for the shortfall (estimated to be $6.1 million per year) between fees assessed in individual cases and the direct costs for administering those cases). *See also id.* at 10048 ("the arbitration program is subsidized by the NASD and its members"); NASD Notice to Members 99-23 (March 18, 1999) ("Since its adoption of the Code in 1968, the NASD has subsidized a substantial portion of the cost of the arbitration program from general member assessment revenue.").

12. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (Cont'd)

NASD arbitration decisions show that in arbitration, unlike in litigation, losing claimants are rarely assessed costs (suggesting that arbitrators' freedom from strict adherence to the rules of litigation benefits plaintiffs).

Even if there were reason to believe arbitration is more expensive overall than litigation (which appears doubtful), it would be no reason to hold that Congress intended to preclude agreements to arbitrate Title VII claims, as *Vimar Seguros* makes clear. Because this issue is not an important unsettled one, the Court should deny review.

C. No Circuit Split Exists.

The Petitioner asserts that a circuit split exists on the question whether a risk of incurring forum fees renders an

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(1981) (even for a civil rights plaintiff, "liability for costs is a normal incident of defeat"); *Contreras v. City of Chicago*, 119 F.3d 1286, 1295 (7th Cir. 1997) (civil rights plaintiff who loses is liable for costs unless narrow exception such as indigence applies; chilling effect on civil rights claims is not a reason to deny costs); *Cypress-Fairbanks Indep. School Dist. v. Michael F.*, 118 F.3d 245, 256-57 (5th Cir. 1997) (chilling effect is no reason to deny a prevailing defendant Rule 54(d) costs; costs of $6,770 imposed on losing disabilities/civil rights plaintiff); *Jones v. Continental Corp.*, 789 F.2d 1225, 1233 (6th Cir. 1986) (rejecting argument that "taxing costs against a losing civil rights plaintiff would conflict with the remedial purposes of Title VII"); *Poe v. John Deere Co.*, 695 F.2d 1103, 1108 (8th Cir. 1982) (same); *Delta Air Lines, Inc. v. Colbert*, 692 F.2d 489, 490-91 (7th Cir. 1982) (same); *Barnett v. City of Chicago*, 1999 WL 138813, at *7-8, 10 (N.D. Ill. March 5, 1999) ($11,674.89 in costs imposed on losing plaintiffs, despite claims of hardship and chilling effect on assertion of important civil rights claims); *Pion v. Liberty Dairy Co.*, 922 F. Supp. 48, 50-51 (W.D. Mich. 1996) (same; costs of more than $8,000 awarded against losing plaintiff); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 157 F.R.D. 13, 18 (E.D. Pa. 1994) (same; more than $12,000 in costs imposed on losing plaintiff).

arbitration agreement unenforceable. The supposed split of authority does not exist.

Shankle v. B.G. Maintenance Management, 163 F.3d 1230, 1234-35 (10th Cir. 1999), held an arbitration agreement invalid, but only because it mandated in advance that the employee must pay forum fees regardless of outcome (a result that may be an improper prospective waiver of a prevailing Title VII plaintiff's right to recover costs, 42 U.S.C. § 2000e-5(k)). *Shankle* expressly stated that other arbitral schemes are not invalid, citing *Gilmer* and the securities arbitration scheme at issue here. 163 F.3d at 1234 & n.3. In contrast to *Shankle*, under securities arbitration the arbitrator remains free to waive or allocate costs as appropriate, as the Seventh Circuit held below. A. 10a.

Paladino v. Avnet Computer Techs., 134 F.3d 1054 (11th Cir. 1998), also denied arbitration, but on the ground that the arbitration agreement forbade arbitrators from awarding Title VII or ADEA remedies, making the agreement either not extend to Title VII or ADEA claims (*id.* at 1058), or contain an unlawful limitation of remedies (*id.* at 1060-62). Although the concurrence expressed additional concern about the cost of arbitration to plaintiffs, the court's holding was based on the limitation of remedies.

No other case cited by the Petitioner denied arbitration because of potential forum fees. The Petitioner assumes that the Ninth Circuit *would* do so, Petition at 10, simply because it denied arbitration of certain claims on different grounds. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998). Since the Ninth Circuit did not address the forum fees issue at all (and actually compelled the plaintiff to arbitrate certain other claims, *id.* at 1200, 1203) it cannot fairly be said to have "split" with any court. Nor can the Third Circuit be said to have "split" the other way, simply because it allowed arbitration in *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998), for *Seus* likewise did not address this issue.

Nor did the D.C. Circuit deny arbitration on this ground. Instead, in *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1483-86 (D.C. Cir. 1997), the court construed an AAA arbitration agreement as not allowing employees to bear forum fees, and *compelled* arbitration.

Contrary to the Petitioner's assertion, neither of the remaining circuits she identifies (the Seventh Circuit (below) and the First Circuit (*Rosenberg*)) held that securities arbitration "requires employees to pay expensive forum or filing fees."[13] Petition at 9. Instead, they recognized that securities arbitrators have discretion to waive or shift fees, and that it is premature to complain of burdensome fees when none have been imposed. A. 10a; *Rosenberg*, 170 F.3d at 15.

The asserted circuit split is illusory and no reason to grant review.

II.

THE "MIGHT NOT FOLLOW THE LAW" ISSUE DOES NOT MERIT REVIEW.

The Petitioner fears that arbitrators will misapply the law. Petition at 14-16. She bases this fear on a single phrase from the 50-page Arbitrator's Manual, taken out of context. Courts have repeatedly recognized that the manual does not counsel arbitrators to ignore the law.[14] In any event, no arbitrator has

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13. The Petitioner cites no case to support her contention that an arbitral filing fee being higher than a court filing fee invalidates an arbitration agreement, much less a circuit split on the issue. In fact, the D.C. Circuit found no problem with an arbitral filing fee. *Cole*, 105 F.3d at 152 n.12. *See also Howard v. Anderson*, 36 F. Supp. 2d 183, 186 (S.D.N.Y. 1999) ($500 arbitral filing fee is not inconsistent with Title VII).

14. *See, e.g., Illyes v. John Nuveen & Co.*, 949 F. Supp. 580, 584 (N.D. Ill. 1996):

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applied any law in this case, because no arbitration has occurred. Review of this issue is unwarranted because: (1) the objection is premature; and (2) there is no circuit split.

A. The Objection is Premature.

The Court has repeatedly stated that "there is no reason to assume at the outset that arbitrators will not follow the law."[15] Instead, the review stage after arbitration has occurred is the proper time to consider this issue: "[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute."[16]

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> [T]he NASD arbitration manual does not instruct arbitrators that they do not have to follow the law; it merely states that they are not "strictly bound by case precedent or statutory law." The arbitrators are also told that if they manifestly disregard the law, the award may be vacated.

See also Seus v. John Nuveen & Co., 1997 WL 325792, at *7 (E.D. Pa. June 2, 1997) ("In fact, the arbitrator's training guide does not tell arbitrators that they do not have to follow the law"), *aff'd*, 146 F.3d 175 (3d Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1028 (1999); *Rosenberg*, 170 F.3d at 16 n.10; *Koveleskie*, A. 9a; *Duffield v. Robertson Stephens & Co.*, 1996 U.S. Dist. LEXIS 21571, at *17-18 (N.D. Cal. Aug. 26, 1996) (rejecting claim based on instructions in the Arbitrator's Manual, court holds that "NYSE arbitration scheme does adequately protect plaintiff's Title VII rights"), *aff'd in part, rev'd in part on other grounds*, 144 F.3d 1182, 1190 n.7 (9th Cir.), *cert. denied*, __ U.S. __, 119 S. Ct. 445 (1998).

15. *McMahon*, 482 U.S. at 232 (1987). *See also Mitsubishi*, 473 U.S. at 634 ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators"); *id.* at 636.

16. *McMahon*, 482 U.S. at 232. *See also Gilmer*, 500 U.S. at 32 n.4; *Mitsubishi*, 473 U.S. at 636-37 & n.19.

The Court recently considered this issue again in *Vimar Seguros*, where the arbitration agreement specified a Japanese arbitral forum. The plaintiff acutely feared that the arbitrators would fail to apply the applicable U.S. statutory law and therefore argued that his arbitration agreement was invalid. The Court held this claim "premature," reaffirming that the time to consider the arbitrators' compliance with the law was on review because the court "will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed." *Vimar Seguros*, 515 U.S. at 540, *quoting Mitsubishi*, 473 U.S. at 638.

The Petitioner contests the Court's repeated conclusion that review will be sufficient, arguing that the standard of review is too strict. For example, the Petitioner argues that a prevailing plaintiff may be entitled to attorneys' fees as a matter of law, yet not be awarded them by an arbitrator. Petition at 14-16. Review is sufficient, however, not only when arbitrators are expressly urged to disregard the law, *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1464 (11th Cir. 1997), but also when they are advised of the law and do not follow it. The cases demonstrate that if a plaintiff has an entitlement (for example, to attorneys' fees) and specifically advises the arbitrator of the law, an erroneous denial of fees may be reversed, even under a strict standard of review. *Contrast DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 822 (2d Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 695 (1998) (arbitrator did not manifestly disregard the law because plaintiff did not tell arbitrator of basis for entitlement to fees), *with DeGaetano v. Smith Barney Inc.*, 983 F. Supp. 459, 462-64 (S.D.N.Y. 1997) (when plaintiff did advise arbitrator of law creating entitlement to fees, the arbitrator's failure to award fees was reversible under the manifest disregard standard).[17]

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17. A party will have every opportunity to advise the arbitrators of the law. Arbitrators are free and even encouraged to accept briefs. *See Valdiviezo v. Phelps Dodge*, 995 F. Supp. 1060, 1070-71 (D. Ariz. 1997).

Because the Petitioner's objection is premature, this issue does not merit review.

B. There is no Circuit Split.

The Petitioner admits that there is no circuit split on the "may not follow the law" issue, but she urges review because "it is likely" there will be one in the future, based on an asserted "shared reasoning" among decisions that have denied arbitration on other grounds. Petition at 15. It is not appropriate to grant review of an issue based on a party's prediction of future circuit conflicts that do not and may never exist.

Indeed, the Petitioner's predictions that four courts "would reject" the reasoning of the Seventh Circuit (Petition at 15) cannot withstand scrutiny. For example, she asserts that the Ninth Circuit would "[n]aturally" reject securities arbitration on the "may not follow the law" theory, but overlooks the fact that the Ninth Circuit compelled arbitration of a plaintiff's non-statutory claims (*Duffield*, 144 F.3d at 1200, 1203), and has compelled arbitration of Title VII claims in the past (*Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992)). Similarly, *Shankle* and *Paladino* did not void arbitration agreements because of supposed inadequate procedures, but rather because of a " 'prospective waiver of a party's right to pursue statutory remedies,' " which the Court has condemned as against public policy. *Vimar Seguros*, 515 U.S. at 540, *quoting Mitsubishi*, 473 U.S. at 637 n.19.

And while the Fourth Circuit in *Hooters of America, Inc. v. Phillips* did reject an arbitral forum because of its procedural inadequacies, the court stated that its decision was based on generally-applicable contract principles (the employer's breach of its promise to draft fair procedures), not on Title VII. 1999 WL 194438 (4th Cir. April 8, 1999), at *7. Otherwise, it acknowledged, "[p]redispute agreements to arbitrate Title VII claims are . . . valid and enforceable." *Id.* at *3-4. The court specifically cautioned that its decision should not "be

misunderstood as permitting" the kind of "full-scale assault on the fairness of proceedings before a matter is submitted to arbitration" (*id.* at *7) that the Petitioner has advocated.

This Court has stated that "insular distrust of the ability of . . . arbitrators to apply the law" is not a basis for relieving a party of its agreement to arbitrate. *Vimar Seguros*, 515 U.S. at 539. There is no reason to presume that the Petitioner and Respondent will be "unable or unwilling to retain competent, conscientious, and impartial arbitrators" to resolve their dispute. *Mitsubishi*, 473 U.S. at 676. Rather, the Court of Appeals below correctly applied controlling precedent when it concluded that, in the unlikely event of an error, "judicial review of arbitration awards is sufficient to protect statutory rights." A. 11a.

III.

THE EFFECT OF THE 1991 CIVIL RIGHTS ACT ON ARBITRATION AGREEMENTS DOES NOT WARRANT REVIEW.

As discussed above, the FAA makes arbitration agreements presumptively enforceable, unless: (1) no valid agreement exists under state contract law (an issue not raised here); or (2) Congress overrode the FAA in another statute. Having argued in Sections I.A and I.B of the Petition that her arbitration agreement is unenforceable on "forum fees" and "might not follow the law" bases, without reference to the necessary legal standard (whether Congress intended to override the FAA on these bases), the Petitioner argues in the final section of her Petition that in the 1991 Civil Rights Act amendments to Title VII Congress did so intend. This argument cannot be independent of the earlier "forum fees" and "might not follow the law" arguments. Nor do the Petitioner's arguments, when directly addressed to the critical issue of Congress's intent, add any compelling reason to grant review: (1) the 1991 Act does not address the "forum fees" or "might not follow the law"

issues, but rather "encourages" arbitration; and (2) while there is a circuit split on whether the 1991 Act overrode the FAA for Title VII claims, the clear trend in the circuits is to enforce agreements to arbitrate Title VII claims.

A. The 1991 Civil Rights Act Does not Address the "Forum Fee" or "Might not Follow the Law" Issues.

Section 118 of the 1991 Act states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII and other civil rights statutes].

A. 42a. This section, the Petitioner argues, evinces a congressional intent to override the FAA, carving out as unenforceable those arbitration agreements affected by the "forum fees" and "might not follow the law" issues. Petition at 17-19.

The Petitioner cites no statutory language to support her position. The text of Section 118 nowhere refers either to forum fees or to the possibility that arbitrators might not follow the law. Indeed, the text of Section 118, so far from placing limits on the enforceability of arbitration agreements, expressly "encourages" arbitration.

The Court has made clear that if a statute's text does not evidence a congressional intent to preclude arbitration, the party seeking to avoid arbitration must show "an irreconcilable conflict" between arbitration and the statute's underlying purposes. *McMahon*, 482 U.S. at 238-39. The Petitioner asserts that the purpose of the 1991 Act was to strengthen Title VII (Petition at 17),[18] but she does not explain why arbitration would

18. In particular, she mentions the addition of rights to damages and a jury trial, and enhanced rights to attorney's fees. Any substantive (Cont'd)

be inconsistent with that purpose, particularly when the statute "encourages" arbitration. " 'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' " *Rodriguez*, 490 U.S. at 481, *quoting Mitsubishi*, 473 U.S. at 628.

Instead of relying on the text, the Petitioner seeks refuge in pieces of legislative history, which she asserts "demonstrate Congress's belief" that her particular agreement is unenforceable. Petition at 18. But the text of Section 118 is not ambiguous, particularly when viewed, as it must be, "with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26. Absent such ambiguity, resort to legislative history is neither legitimate nor appropriate, for "legislative history is 'only admissible to resolve doubt and not to create it.' " *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989), *quoting Wisconsin R.R. Comm'n v. Chicago, B. & O. R.R.*, 257 U.S. 563, 589 (1922).

Even if it were appropriate to consider legislative history, however, nothing in the legislative history of the 1991 Act remotely addresses the issues of forum fees and the possibility that arbitrators might not follow the law. Rather, the legislative history reveals sharp debate about whether Title VII claims should be arbitrable at all. *Compare* H.R. Rep. No. 40(I)97, *reprinted in* 1991 U.S.C.C.A.N. 635; 137 Cong. Rec. H9505-01, *H9530 (Nov. 7, 1991) (Rep. Edwards) ("No approval is

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right to damages and attorney's fees can be resolved in an arbitral forum. *See Gilmer*, 500 U.S. at 32. Jury trial is a procedural, not a substantive, matter (*see Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)), and parties are free to forgo that procedure by electing an arbitral forum. Indeed, the Court found no problem enforcing such an election in *Gilmer*, even though the substantive statute there at issue (ADEA) already featured a jury trial right (*see Lorillard v. Pons*, 434 U.S. 575, 580-85 (1978)). *See Rosenberg*, 170 F.3d at 11.

intended of the Supreme Court's recent decision in *Gilmer*") *with* 137 Cong. Rec. H9505-01, *H9548 (Nov. 7, 1991) (Rep. Hyde) (Section 118 "encourages the use of alternative means of dispute resolution, including binding arbitration . . . . [T]here is no reason to disfavor the use of such forums. *See Gilmer*"); *and* 137 Cong. Rec. S15472-01, *S15478 (Oct. 30, 1991) (Sen. Dole) (same).[19] But "[t]he text adopted by the full Congress declares that lawful 'arbitration . . . is encouraged to resolve disputes arising from [Title VII]." *Seus*, 146 F.3d at 182 (brackets in original).

As the Court observed in *Vimar Seguros*, " 'when [the FAA and another statute] are capable of co-existence, . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' " 515 U.S. at 533, *quoting Morton v. Mancari*, 417 U.S. 535, 551 (1974). Here, there is not even a hint of congressional intention, from the text, purpose, or legislative history of Title VII, to make Title VII override the FAA when a claimant might incur forum expenses or an arbitrator might fail to follow the law — just as the Court found no congressional intention to override the FAA in precisely these circumstances in *Vimar Seguros*. Nor has the Petitioner cited any case to the contrary. Without an unsettled important issue or a conflict in the courts, there is no basis to grant review of this issue.

B. The Effect of the 1991 Civil Rights Act on *Gilmer* Does not Merit Review.

Rule 14.1(a) provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly

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19. *See* Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 861-62 (1992) (observing that such use of legislative history is like "looking over a crowd and picking out your friends," and noting that where the legislative history of a statute is so confusing and contradictory that it is of no use in ascertaining Congress's intent, courts should not attempt to use it).

included therein." Although the Petitioner does not address it, whether the 1991 Act overruled *Gilmer* presents such a question.

In the wake of *Gilmer*, and before *Duffield*, every circuit court to consider the issue, including the Ninth Circuit, held that a predispute agreement to arbitrate Title VII claims was enforceable under the FAA.[20]

In *Duffield*, a separate panel of the Ninth Circuit (Reinhardt, Canby, and Restani, JJ.) held that the 1991 Act overruled *Gilmer*, without attempting to distinguish *Mago*.[21] Reasoning that the legislative history of Section 118 demonstrated an intent to codify pre-*Gilmer* law, which was hostile to arbitration, Judge Reinhardt held that predispute agreements to arbitrate Title VII claims, entered into as a condition of employment, are unenforceable. 144 F.3d at 1189-90. Although the Petitioner urged the Court of Appeals below to follow *Duffield* in this

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20. *See Cole*, 105 F.3d at 1468-69; *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881-82 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 432 (1996); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 229-30 (5th Cir. 1991) (opinion after Supreme Court granted certiorari, vacated decision refusing to compel arbitration of Title VII claim, and remanded for further consideration in light of *Gilmer*); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307, 312 (6th Cir. 1991); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (Wallace, C.J., Goodwin and Kozinski, JJ.); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1486-87 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992).

21. In fact, in an unpublished 1994 disposition the Ninth Circuit considered and rejected the very arguments that persuaded a separate panel of the court in *Duffield*. The court held that the plaintiff's "citation to the legislative history, by which she attempts to distinguish *Gilmer* and *Mago*, is unavailing." *Hurst v. Prudential Securities Inc.*, 21 F.3d 1113 (9th Cir. 1994) (table) (Lay, S.J., Thompson and Rymer, JJ.), 1994 WL 118097, at *6 n.2.

regard, she does not suggest that this Court should take review on this issue.

The Respondent agrees that review is unwarranted for two reasons. First, because the defendants in *Duffield* sought review in this Court without seeking rehearing en banc, the Ninth Circuit has yet to address the apparent intra-circuit conflict between *Duffield* and *Mago*. Second, every circuit court to consider the effect of Section 118 in light of *Duffield* has rejected the Ninth Circuit's reasoning. *See Rosenberg*, 170 F.3d at 10-12; *Seus*, 146 F.3d at 182-83 & n.1; *Koveleskie*, A. 5a-9a. This Court denied review in *Duffield* and *Seus* earlier this Term. As the issue continues to percolate, the clear trend is in favor of enforcing predispute agreements to arbitrate Title VII claims. It would better conserve this Court's scarce resources to permit the Ninth Circuit the opportunity to reconsider *Duffield* in light of these developments.

CONCLUSION

The three issues presented here are not worthy of review because, in addition to problems of standing and prematurity, they present neither unsettled questions of great importance nor involve a split in the circuits. Indeed, the Petitioner's particular objections to securities industry arbitration pursuant to Form U-4 have no prospective vibrancy in light of recent changes to the exchanges' arbitration rules. The petition for writ of certiorari therefore should be denied. If any review is allowed, it should be limited to the issue whether the 1991 Civil Rights Act overruled *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and exempted civil rights laws, including Title VII and ADEA, from the Federal Arbitration Act.

Respectfully submitted,

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